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The most remarkable feature of ancient same-sex sexual relations is the longevity of the ... pattern that governed all respectable and virtually all recorded sexual relationships between males in classi [*1543] cal antiquity. There is evidence for the existence of such a pattern as early as Minoan times and as late as the end of the Roman Empire in the West. n100

One should not overclaim here; one may admit that there were many changes of different types. And yet, as I shall argue, certain important features of the picture of homosexual love were widespread and persisted for a long time.

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n100. David Halperin, Homosexuality, in The Oxford Classical Dictionary (3d ed. forthcoming 1996) (manuscript on file with the Virginia Law Review Association).

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First, the picture shows us a culture in which the sexual appetite is not found per se problematic or shameful. Here I agree with both Kenneth Dover and Michel Foucault: there is a great distance, both in the general culture and in the philosophers, from the Christian problematizing of sex. n101 No appetite is per se wicked; all appetites need careful management. Sex, like any other pleasure, may be "used" either well or badly. Thus, the topic of sex is standardly addressed in connection with the virtue of self-control or moderation (sophrosune), n102 in close proximity to the treatment of moderation in eating and drinking. n103 [*1544]

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n101. See Dover, Greek Popular Morality, supra note 85, at 205-16; Foucault, supra note 96, at 38-52.

n102. One small criticism I would make of Kenneth Dover's otherwise remarkable treatment of Aeschines' Against Timarchus is his rendering of sophron as "chaste." See Dover, Greek Homosexuality, supra note 48, at 47. Surely "to be in love with those who are beautiful and chaste," id., suggests that the object of love abjures sexual conduct; the Greek suggests, instead, that the object has a balanced, temperate relation to sexual conduct. The more precise translation would in any case be more in keeping with Dover's interpretation: the eromenos is expected to be properly temperate in not enjoying sexual conduct but will not refuse it in the right circumstances. To this point Dover now responds that, given the degree of idealization of the conduct of the eromenos imported into the picture by Aeschines, it is not wrong to use a term that does suggest that (in the somewhat distorted picture put forward by Aeschines) the young man does abjure sexual conduct. See Dover Letter III, supra note 35, at 2. I am not yet convinced. I think that sophron was such a ubiquitous and highly general moral term, denoting temperate and moderate behavior in general, that it would be hard for a fourth-century audience to have heard it in such a highly specific way. But, given that Dover and I agree that Aeschines' picture does not represent cultural reality without distortion, this tiny difference does not affect our underlying agreement about Athenian social reality.

n103. See Aristotle, Nicomachean Ethics III.5-6; Plato, Laws 636-37; Plato, Phaedrus 238a-c; Plato, Republic 436b-439d; infra note 221; see also Foucault, supra note 96, at 101 (listing exercise, food, drink, sleep, and sexual relations as the areas encompassed by the Greek notion of a regimen).

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Second, and again in agreement with the picture presented in Dover, there is neither general condemnation of same-sex acts as such nor a view that the desire to perform such acts is the sign of a wicked or depraved character. Dover's book amply demonstrates that "the Greeks regarded the sexual arousal of an older male by the sight of a beautiful younger male as natural and normal." n104 Homosexual copulation was not viewed as per se immoral or as criticized by the gods. Dover summarizes:

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n104. Dover Letter I, supra note 48, at 2 (summarizing the argument in Dover, Greek Homosexuality, supra note 48, at 60-68, where much evidence of the perceived naturalness of this desire is assembled). For just one example, see Dover's discussion of Xenophon's Hiero I.33, where Hiero tells the poet Simonides that his passion for a youth "is for what human nature perhaps compels us to want from the beautiful." Dover, Greek Homosexuality, supra note 48, at 61.

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The Greeks in general believed that many kinds of behaviour, notably fraud, perjury, robbery, and the like, were offensive to the gods and incurred divine punishment in this world or the next. They certainly did not include homosexual copulation among these modes of behaviour; indeed, the gods themselves enjoyed it. n105

Indeed, Dover strongly contrasts Greek attitudes in this respect with recent attitudes in our own tradition, which he describes as "the sentiment of a culture which has inherited a religious prohibition of homosexuality and, by reason of that inheritance, has shown (until recently) no salutary curiosity about the variety of sexual stimuli which can arouse the same person." n106

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n105. Dover Letter I, supra note 48, at 2. For a discussion of homosexuality in Greek mythology, see Dover, Greek Homosexuality, supra note 48, at 196-203. Dover notes that "Pindar's gods are too refined to digest anything but ambrosia, but never so insensitive that their genitals cannot be aroused." Id. at 198.

n106. Dover, Greek Homosexuality, supra note 48, at 203.

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Indeed, we may go further: in Greek culture and practices, the gender of the partner assumes far less importance than it does in our own society, and is usually taken as less salient than many other facts about a sexual act. Nor

are people very often categorized socially in accordance with their orientation toward partners of a particular gender. It is assumed that abundant appetitive energy may find an outlet in intercourse with either gender, and the two possibilities are frequently treated as more or less interchangeable for moral purposes, youths and women being coupled together as likely pleasures for a man to pursue. To cite just one [*1545] example analyzed by Dover, in Aristophanes' Acharnians the delights of peace are praised in a hymn to Phales, the god in whose honor a phallus is carried in procession. These delights include sex with young men, adultery with married women, and the rape of a pretty Thracian slave girl - all being listed without distinction, as more or less interchangeable pleasures for the male hero. n107

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n107. See id. at 136 (translating Aristophanes, Acharnians 263-79). For many more examples, see id. passim; David M. Halperin, One Hundred Years of Homosexuality, in One Hundred Years of Homosexuality and Other Essays on Greek Love 15, 15-40 (1990).

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As for actual practices, in Sparta we find evidence of a strong encouragement of male-male relations in connection with the military culture, and also of female-female relations, as evidenced in erotic parts of young girls' choral poetry. n108 For female-female relations elsewhere, the primary evidence is the poetry of Sappho, correctly interpreted by Dover and John J. Winkler as giving clear evidence of sexual acts as well as romantic friendship. n109 Aristophanes' speech in Plato shows that such relationships were familiar to Athenians as well. n110 Although all such arguments must remain rather speculative, the surviving evidence being so slight, Winkler has argued that the lyrics of Sappho give evidence that female-female sexuality was less asymmetrical, less governed by the dichotomy of penetrator-penetratee, and more mutually sensuous than other sexual relationships in Greek society. n111 It is interesting to note that Artemidoros, who otherwise does not bother to mention female-female acts in his elaborate list of sex acts (presumably because his clientele was all male), does include in the category of acts "against nature" n112 - a category of weird and counterfactual, rather than vicious acts, and one that includes the perpetual fantasy of making love with a god or goddess - the description "a woman penetrating a woman." n113 He evidently finds this so weird as to be [*1546] impossible, though there is no sign that he believes anything one way or the other about other sex acts between women. n114

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n108. See Dover, Greek Homosexuality, supra note 48, at 179-88.

n109. See id. at 171-80; Winkler, supra note 97, at 162-87. Dover argues that one fragment refers to an orgasm. Dover, Greek Homosexuality, supra note 48, at 175-76, 182.

n110. See Plato, Symposium, 191e. This would appear to be the only passage in Athenian literature to describe female-female relationships.

n111. See Winkler, supra note 97, at 162-87.

n112. Id. app. at 215-16.

n113. Id. app. at 216 (translating Artemidoros). The acts are "against nature," it would seem, because to perform them would violate the rules of what is possible. The other main examples in this section are self-fellatio, presumed to be physically impossible; sex with the moon; sex with a dead person - again, presumed impossible (Artemidoros is presumably thinking not of necrophilia, but of the fantasy that one actually succeeds in having regular intercourse with someone who is lost); and sex with various animals, especially wild animals. Id. app. at 215-16. This last case may be possible in a way the others are not - though it all depends how wild the animals are! It is not too clear what leads Artemidoros to classify it with the impossibles, except that he may be concentrating on the vast majority of cases, where the animals are too wild or are otherwise unavailable.

n114. As to the sex acts that occurred or were believed to occur, Dover; on the basis of the evidence about the sexual practices of the women of Lesbos (involving both men and other women), concludes as follows: "They are likely to have been credited with all such genital acts as the inventive pursuit of a piquant variety of pleasure can devise, including homosexual practices together with fellation, cunnilinctus, threesomes, copulation in unusual positions and the use of olisboi." Dover, Greek Homosexuality, supra note 48, at 183-84. On olisboi (dildos) and female masturbation, see id. at 176 n.9.

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But for Athens, most of our evidence, both literary and artistic, pertains to male-male relations. Here we find - again I am agreeing with Dover - no general condemnation of male-male relations, a fortiori not a general moral condemnation. Indeed, Dover, like David Halperin, produces and stresses the evidence that visiting both male and female prostitutes was considered perfectly acceptable for a male citizen, and male prostitution is treated as a perfectly routine matter in texts of many kinds. n115 Even in the midst of his moralizing denunciation of Timarchus (a citizen) for prostituting himself, Aeschines hastens to reassure his audience that he has no intention of discouraging the general practice of male prostitution; his aim, instead, is to guarantee that people who want casual sex with young men "turn to foreigners and resident aliens so as not to be deprived of what they prefer." n116

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n115. See id. at 20-22, 33-39, 42, 67, 107-09. The most extensive treatment of this point is in David Halperin, The Democratic Body, in One Hundred Years of Homosexuality and Other Essays on Greek Love, supra note 107, at 88-112, 180 n.3, 182 n.28, 183 n.31, 184-85 n.60.

n116. Aeschines, Against Timarchus 195. On this passage, see Halperin, supra note 115, at 180 n.3.

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Where relations between two male citizens are concerned, we again find no general condemnation, but instead a complex system of caveats or reservations. We must begin by noting that these relations, even when they involve people close to one another in age, always involve an asymmetry of roles: the erastes

or "lover" is the older partner, who actively pursues and courts the younger, drawn by the sight of youthful male beauty. The erastes is expected [*1547] to be keenly interested in sexual contact; this interest, and the active, penetrative conduct that follows from it, is taken to be perfectly normal and natural. The younger partner, the eromenos or "beloved," is likely to be pleased at being the object of admiration and interested in benefits such as friendship, education, and political advancement that a relationship with an erastes may bestow. The relationship may in this sense involve a real reciprocity of benefits and mutual affection based on it. But the cultural norm dictates that the eromenos is not to have a keen sexual interest in being penetrated, nor to develop habits of enjoying that sort of penetration; for that would be, in effect, to be turned into a woman, and one could expect that this would make him unfit to play, later in life, an active manly role. n117

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n117. See Dover, Greek Homosexuality, supra note 48, at 103.

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This being the case, the relationship between an older and a younger male citizen was hedged with a complex series of caveats and reservations:

(1) No citizen could receive money for sex. Proof that one did was disqualifying for citizenship because it was connected closely with the idea that one had put one's own body up for sale to the highest bidder and hence with the idea of treason: In a democracy where most major offices are filled by lot, one does not want to have a citizen who may be purchased. Receipt of many gifts could also give rise to the suspicion that one's favors are being bought. n118

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n118. For the best treatment of this set of connections, see id. at 107-09; see also Winkler, supra note 97, at 46, 57 (pointing out the relationship between male citizenship and male prostitution).

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(2) There were grave strictures against sexual violence and enticement, especially against the young. As Dover shows, hubris need not mean actual sexual assault. It usually does carry that meaning when the subject of the verb hubrizein is an adult male and the object a woman or a boy, but the term may be at times extended to include "dishonest enticement, threats, blackmail" and other forms of nonphysical coercion. n119 It seems wrong, however, to assert that a fully consensual relation between erastes and eromenos could be stigmatized as hubris - except by someone [*1548] alleging that it did after all contain one or more of the forbidden forms of coercion. n120

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n119. Dover, Greek Homosexuality, supra note 48, at 36.

n120. David Cohen argues that a father could bring a prosecution of hubris against the consensual lover of his son. See David Cohen, Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens 176-77 (1991). Dover

points out in his recent review of Cohen that we know of not a single case in which this actually occurred. Kenneth Dover, Law, Sexuality, and Society, 65 Gnomon 657, 658-59 (1993) (book review). He also criticizes Cohen for generalizing hastily from passages in Aeschines that are likely to contain self-serving distortions of popular norms. Id. at 659. Cohen's book was repeatedly cited as a central authority by Finnis, see, e.g., Finnis Affidavit, supra note 25, 32-33, although it appears to offer no support to Finnis' positive thesis regarding the marital bond and insists, consistent with Dover's analysis, that the penetrative homosexual role is not per se problematic, see Cohen, supra, at 182. Like Dover, Cohen insists that it is passivity that involves stigma - although he differs from Dover in his account of the circumstances under which such stigma was incurred. Dover's counterarguments show, I believe, that Cohen has not given us any good reason to diverge from Dover's analysis.

I should now mention a larger issue, as David Cohen emphasized to me. See Letter from David Cohen, Chairman, Department of Rhetoric, University of California, Berkeley, to Martha Nussbaum (Apr. 27, 1994) (on file with the Virginia Law Review Association). The thesis of Cohen's book, and especially of its final chapter, is that the notion of a private sphere, immune from interference by the state, was absolutely essential to the Athenian notion of radical democracy. See Cohen, supra, at 218-40. The introduction to the book opens with a strong attack on contemporary American and English statutes that penalize consensual sexual behvior, and, specifically, homosexual conduct. Id. at 2-3. Cohen holds that the proper way to use his book in the context of these public issues is to argue that the state has no business trying to use the law to enforce morality. To this end, he deliberately draws attention to the contrast between ancient Greek views on privacy and modern sexual legislation. Id. at 218-20.

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(3) Habitual passivity, regularly being the partner penetrated, was much criticized, as I have said, and was taken as evidence that one was not fully manly. n121 The Aristotelian Problemata (probably written not by Aristotle but by his students) said such behavior shows that the person is physically malformed, with his fluid-bearing "ducts" going to the anus rather than to the penis. n122 As a result, there is strong anxiety about passivity in general.

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n121. See supra text accompanying note 117.

n122. Aristotlelian School, Problemata IV.26; see also infra text accompanying note 307 (describing Dover's treatment of the Problemata).

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(4) Finally, there is widespread criticism of those who seek casual bodily pleasure in their interactions with younger males without caring for friendship and other values. n123

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n123. See Dover, Greek Homosexuality, supra note 48, at 91.

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Where the relationship between an older and a younger male citizen is concerned, therefore, the individuals had to be careful. The penetrative role was per se unproblematic, and if one pene [*1549] trated a male prostitute, it was perfectly acceptable, just as if one penetrated a female prostitute. It was not merely common, but widely approved, for married males to visit prostitutes of either sex. But with young males who will be citizens, caution had to be exercised not to corrupt them with excessive gifts and not to encourage habits of passivity. For this latter reason, a cultural ideal, prominently depicted in visual art, was the choice of intercrural intercourse - intercourse in which the older partner achieves orgasm by friction of the penis between the younger man's tightly clenched thighs. It is clear, however, that this is not the whole picture. In Greek comedy, anal penetration is taken to be the norm, as Dover stressed in his first edition. n124 In the postscript to his second edition he now grants that this fact may well indicate that the vase-painters' preference for the intercrural mode may be "highly conventional." n125 In the Greek Anthology and the dream book of Artemidorus, anal intercourse is again taken to be the norm, and intercrural copulation is not mentioned. Artemidoros classifies both active and passive anal acts as acts that are both "according to nature" and "according to custom." n126 So it would appear that both in fifth-century Athens and in the later period represented by the Greek Anthology and Artemidoros, anal acts between citizens occurred.

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n124. See id. at 135-53.

n125. See id. at 204.

n126. Winkler, supra note 97, app. at 210-11.

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How were these acts viewed? The evidence of comedy must be read with caution, for as Dover shows the comic genre depicts human motivation as consistently venal and selfish, not only in the sexual domain. n127 It would be wrong to infer from comedy that the penetratee was generally thought to have been bought. On the other hand, it is also clear that anal passivity would be a source of anxiety and possible shame, if the young man were thought to be developing habits of passivity. The best solution to this problem seems to me to be one suggested by David Halperin, invoking conventions of public and literary evidence already demonstrated by Dover. n128 The suggestion is that anal acts were assumed to occur between the erastes and his citizen eromenos, but they were not in [*1550] general to be publicly mentioned; to speak publicly of what everyone took for granted would incur shame for the youth. This conclusion is fully consistent with Dover's analysis. The important point to stress, in any case, is that the shame potentially at issue was not about the fact of same-sex copulation, but about the "womanish" position of passivity and its potential appearance of being turned into a woman. No such shame, it would seem, attached even potentially to conduct that did not involve anal penetration, thus not to conduct involving intercrural intercourse, apparently the most common mode of male-male copulation.

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n127. See Dover, Greek Homosexuality, supra note 48, at 11.

n128. See Halperin, supra note 100.

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As for oral sex, the Greeks seem to have had some aversion to this form of conduct, and especially to the receptive role. One might now ask what the ground of this aversion was and whether it showed a belief that the conduct in question was wicked and depraved. I believe that it does not show such a belief. The most extensive treatment of the issue is in Artemidoros, who repeatedly refers to the idea that such intercourse makes the mouth unclean. n129 He generally considers the dream of oral sex to be ill-omened for this reason. n130 On the other hand, there is no sign that he regards people who like this sort of thing as wicked, depraved, or depraving. He mentions a pair of clients whose dreams he had a hard time interpreting because they did not mention the simple fact that they liked oral sex and were dreaming of what excited them. And his emotion to them, if any, is irritation that they wasted his time by not informing him of this earlier, not moral disgust or reprobation. n131 He also holds that the dream of oral sex is an auspicious one for "those who earn their living by their mouths, I mean flutists, trumpet-players, rhetors, sophists, and others like them." n132 His attitude to the phenomenon is cheerfully pragmatic, not moralistic: the sexual act is a metaphor for the profitable practice of these trades. This is consistent with what we know from elsewhere: Greek comedy, for example, contains jokes about oral sex, as it also does about flatulence, diarrhea, toothlessness, and body odor. The attitude is very similar: all these things are a little gross, so that one can poke fun at them; they are certainly not aes [*1551] thetically appealing. That is a long way from moral condemnation of the acts as wicked, an attitude of which I find no sign in the evidence. n133

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n129. See Winkler, supra note 97, app. at 215.

n130. See id.

n131. See id. at 29.

n132. Id. app. at 215.

n133. One might compare the Nigerian attitude to oral sex depicted in Chinua Achebe, Anthills of the Savannah 69 (1987), in which a young African woman, amazed and a little revolted by the idea (picked up by her lover during a stay in England), expresses particular disgust at the idea of not showering first.

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We must now address the question of age. Finnis repeatedly called the relationship of erastes and eromenos a "man-boy" relationship, alleging that nobody has bothered to inquire how young the "boys" actually were. n134 But this is not so. Dover and others have commented on this matter at length, assisted by the clear evidence of visual art. To modern American ears the word "boy"

suggests someone between the ages of, say, four and twelve. But the eromenos of Greek custom was typically, and ideally, a young man between the time of full attainment of adult height and the full growth of the beard. If we go by modern growth patterns, he was perhaps sixteen to nineteen; but more likely, because the ancient Greek age of puberty seems to have slightly later than ours, the age of a modern college undergraduate. A particularly clear summary of the evidence, concurring with Dover's analysis, is made by David Halperin:

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n134. See, e.g., Finnis Rebuttal, supra note 39, 24. Finnis states:

Nussbaum is further inviting the Court to admire a culture in which the primary, and perhaps the only, socially approved sorts of same-sex sex acts were between adult men on the one side and boys on the other. Nussbaum herself, and the several pro-"gay" writers on classical Greek sex whom she praises in her publications, display no noticeable interest whatever in the question whether there was an age of consent for the young boys between whose thighs grown men (with or more likely without social approval) performed what she calls "inter-crural intercourse" (graphically described by Dover at page 98). Neither she nor the others inquire how young such boys might therefore be in practice.

Id. Note that Finnis, as usual, completely bypasses the possibility of penetrating a prostitute or a noncitizen, which would be widespread and socially approved forms of same-sex conduct; he also, as usual, omits same-sex relations among women.

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The conventional use of the term "boy" to designate a male in his capacity as an object of male desire is somewhat misleading, because males were customarily supposed to be sexually desirable to other males mostly in the period of life that extended from around the time of puberty (which probably began quite late in the ancient Mediterranean) to the arrival of the full beard ..... By "boy," then, the ancients designated what we would call an adoles [*1552] cent rather than a child. Moreover, "man" and "boy" can refer in both Greek and Latin to the senior and junior partners in a paederastic relationship ... regardless of their actual ages. A boy on the threshold of manhood might assume the sexual role of a boy in relation to a man as well as the sexual role of a man in relation to another boy, but he might not play both roles at once in relation to the same person. n135

One should consider that the entire life-span in ancient Greece was compressed in relation to ours, given the lower life expectancy even for those who survived childhood. More importantly, one should also consider what the typical eromenos was expected to do and be, for our own children grow up much more slowly than young people in the ancient world. We might begin with Achilles and Patroclus - who were widely interpreted in later Athens as an erotic couple, whether that is how Homer saw the matter or not. Whichever of the two is the younger (and Plato's Phaedrus takes issue with Aeschylus on this point), both have to be old enough to be leading figures in a military expedition. n136 Next we have another prime Platonic example, the tyrannicides Harmodius and Aristogeiton, again, both mature enough for concerted political action, though they clearly differ in

age. n137 We also have the famous Sacred Band of Thebes, an elite military corps made up of [*1553] male-male couples - once again, both old enough to fight. n138 In short, the proverbial eromenos was more adept at the affairs of the world than is the typical college undergraduate, probably because he was not a college undergraduate, but involved in adult society.

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n135. Halperin, supra note 100 (citation omitted); see also Dover, Greek Homosexuality, supra note 48, at 85-86 (noting that the term pais (boy) is used of the younger partner, even though he may have an age that, outside the erotic context, would make other words for "youth" and "adolescent" more appropriate). In one text, Aristophanes, Peace 869b, a female bride is even called pais.

n136. On Achilles and Patroclus, see Plato, Symposium 180a-b. Phaedrus says that Aeschylus is wrong to make Achilles the older, on the grounds that Achilles was clearly beardless, and was also the most beautiful of all the heroes. Id. (The eromenos is assumed to be more beautiful than the older erastes.) The fragments of Aeschylus' lost Myrmidons give clear evidence that he saw the relationship as one involving sexual conduct, presumably intercrural intercourse: Achilles, mourning for the dead Patroclus, speaks of the "many kisses" they have shared, and of "god-fearing converse with your thighs." See Dover, Greek Homosexuality, supra note 48, at 197-98 (translating Myrmidons). Aeschines interprets Homer's silence on the sexual side of the relationship as a kind of cultivated knowing reticence about what would have been obvious to "educated" hearers. See id. at 41 & n.6, 53. In Xenophon, Symposium 8.31, Socrates denies that Homer intended any erotic element in the portrayal of the friendship. Dover and I agree that he is correct about the heroic age, but, as Dover remarks, Socrates "lived in an age when legend owed its continued hold on the imagination at least in part to the steady importation of homosexual themes." See Dover, Greek Homosexuality, supra note 48, at 199.

n137. See Dover, Greek Homosexuality, supra note 48, at 41; Plato, Symposium 182c.

n138. See infra notes 185-88 and accompanying text.

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Moreover, because the popular thought of our day tends to focus on the scare-image of a "dirty old man" hanging around outside the school waiting to molest young boys, it is important to mention as well that the erastes might not have been very far in age from the eromenos. One could begin to play the role of the erastes, as Halperin correctly insists, even while still playing the role of the eromenos - though one would not play both roles in relation to the same person. Thus, he may have been as young as eighteen, though more typically he would be in his middle twenties and older. In light of the shorter lifespan, he was not all that likely to get to the age we associate with the "dirty old man." n139 Thus, if we are inclined to think that relationships involving a large age disparity are likely to be exploitative (a questionable claim in any case), recognition of the actual age relations gives us a fairer appreciation of the type of exchange that is possible.

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n139. In Plato's Phaedrus, the first speech of Socrates does mention the displeasure of a youth who finds himself continually in the presence of a passionate erastes whose company strikes him as less pleasing than that of youths of his own age. See Plato, Phaedrus 240b-e. He mentions the unappealing look of "the face of an older person who is no longer in his prime." Id. at 240d. But this is in the context of a cultural preference for hairlessness and need not imply a large age difference.

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Although visual art focuses rather obsessively on the youthful, there is certainly evidence of couples in which the eromenos was even older than the norm. Pausanias and Agathon continued for at least twelve years a relationship that began when Agathon was eighteen. n140 The Stoics apparently held that a relationship should continue until the eromenos was twenty-eight. n141 We should also consider the relationship between Plato and Dion of Syracuse, which is at any rate widely (and sympathetically) represented in the evidence of Plato's life as a sexual relationship, and which evidently began when the parties were about fifty and thirty-five respectively. n142 We have, as well, the fact that Plato's Pausanias [*1554] and Aristophanes speak of their norm as that of a lifelong partnership; n143 Pausanias insists that it should not begin until after the growth of the younger party's beard. n144 Aristotle, following Pausanias, defends a long-term alliance as morally best. n145 I would conclude that we err if we read the visual evidence naively or narrowly. One might look at the popular art of our time and form the conclusion that only very young, cadaverously thin women are objects of sexual desire. This would be an unsound conclusion.

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n140. See infra note 183.

n141. See infra text accompanying note 345.

n142. See Nussbaum, supra note 8, at 228-33.

n143. It is not obvious that the partners would be expected to continue sexual relations throughout that time - although Aristophanes' picture, which makes intercourse central to the benefits of the relationship, strongly suggests this. Nor is it obvious that in long-term marriages the parties continue having sex throughout.

n144. Plato, Symposium 181d.

n145. See Aristotle, Nicomachean Ethics 1156b33-34 (on the superiority of an enduring relationship based on character); id. at 1157a3-12 (on the instability of same-sex relationships based on pleasure alone and the stability of same-sex relations based on love of character).

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We must now also address the issue of mutuality, which Finnis misuses to make the erastes-eromenos relationship look inherently exploitative. It is true that the eromenos is depicted typically as deriving no sexual pleasure from the conduct, although this may well be a cultural norm that conceals a more

complicated reality. n146 What is more important is that it is perfectly clear that a successful relationship of this sort produced many advantages for the younger man - education, political advancement, friendship - and that he frequently felt intense affection for the erastes as a result..n147 The tales of courageous self-sacrifice with which Plato's Phaedrus regales his audience would not have seemed surprising. I might add that in the history of Christian marriage, the locus of the sexual conduct favored by Finnis, sexual pleasure and orgasm have frequently been asymmetrical and nonreciprocal. This has not always been taken to be a serious problem. In fact, the asymmetry has commonly been regarded as perfectly acceptable so long as the [*1555] other ends of marriage were promoted. Finnis cannot, in all consistency, use orgasmic asymmetry as a point against the Athenians. It seems to me, in fact, that any possible neglect of the pleasure of the younger man that we are inclined to blame on the erastes is mitigated by the fact that the younger man would not have sought or chosen such sexual pleasure, given his ideals of manliness. Furthermore, he could be expected to go promptly on to active pleasures of his own, in a phase of life that will last much longer than his eromenos phase. By contrast, a woman in an orgasmically unfulfilling marriage typically cannot look ahead to a time when she will find prompt and enduring satisfaction.

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n146. Dover aptly compares the situation of the eromenos to that of a young woman in Britain in the 1930s. Dover, Greek Homosexuality, supra note 48, at 88. He might have extended the comparison to take in this point: just as a proper Victorian woman was publicly expected not to enjoy sex, but frequently did in private, so too it is possible that the eromenos derived more pleasure than is publicly depicted. In his postscript to the second edition, Dover grants that there is some literary evidence that the erastes stimulated the penis of the eromenos, and that one vase shows an eromenos with an erection. Id. at 204.

n147. Id. at 91.

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VI

I now turn to the philosophers. Finnis claims that "all three of the greatest Greek philosophers, Socrates, Plato and Aristotle, regarded homosexual conduct as intrinsically shameful, immoral and indeed depraved or depraving. That is to say, all three rejected the linchpin of modern "gay' ideology and lifestyle." n148 He repeatedly suggests that they do so using, or at least suggesting, an argument similar to his own, one that relies on the moral centrality of the potentially procreative marital bond. n149 Because Finnis ulti [*1556] mately makes claims about Hellenistic philosophy as well - though without discussing the founding thinkers of the Hellenistic traditions, on whose thought all subsequent thought in those traditions relies very heavily - I shall include discussion of Epicurus and the Greek Stoics. In any case, these thinkers belong high up on any list of the "greatest Greek philosophers," both in terms of intrinsic merit and in terms of influence on the subsequent philosophical tradition. I argue that none of the philosophers I shall discuss takes the position described by Finnis, nor does any endorse his positive view of the

marital relationship. Even those texts that do rank nonconsummated same-sex relationships over consummated relationships do so not because they find anything shameful or degrading in homosexual intercourse as distinct from heterosexual intercourse, but for other reasons. Among these is a general suspicion, expressed in some works of Plato, of the power of sexual passion to interfere with reason and a consequent desire to reduce all orgasmic sexual expression to a minimum. In fact, we shall find that same-sex relationships are usually ranked ahead of heterosexual (and, frequently, marital) relationships, on the grounds that they are more likely to be linked with noble and spiritual goals.

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n148. Finnis Affidavit, supra note 25, 35.

n149. I can add at this point that Harvey Mansfield, another witness for the State in Evans v. Romer, claimed that Plato's Symposium was among his sources for the view that gay sex acts are "shameful," Deposition of Harvey Mansfield at 70, so we will want to look for evidence relevant to that claim, too. He also supported his claims that gays' lives are unhappy by appeal to both Plato and Aristotle, among others. Id. at 42-43, 59-60 (citing the Symposium as a source for his views on the unhappiness of homosexuals and claiming that Plato's Republic and Aristotle's Politics support the view that women are happier than homosexuals). The first point quickly became obscure, however, when Mansfield conceded that all sex practices are "shameful" in the sense that one does not do them in public. "Q: So, it is not just sexual practices of gays, but really all sex that is shameful? A: That's right. That can be shameful." Id. at 71. With regard to the second point, it is rather unclear why the claim that gays are unhappy should be taken to support Amendment 2, which cannot be likely to increase their happiness.

Mansfield's third argument for the moral inferiority of homosexuality was that gays are socially irresponsible because they do not have children. Id. at 47-49. I shall argue, following the Greeks, that having children is only one of the many ways in which a sexual relationship can make a social contribution. Mansfield reached a point of great implausibility when he claimed that a married couple who have only one child when they might have two was, to that extent, less socially responsible. Id. at 49-50. This might be plausible were underpopulation an acute social problem; that this is not our present situation hardly needs stating.

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A. Socrates

It is very difficult to reconstruct the views of the historical Socrates on sexual relations. For Socrates' views in general we have four major sources: (1) the dialogues of Plato; (2) several works of the writer Xenophon dealing with Socrates; (3) the Aristophanic comedy Clouds, which offers a satire on Socrates; and (4) various scattered statements by Aristotle. We may ignore (3) and (4), which offer no help with the issue of sexuality. Xenophon's testimony is generally recognized as much less reliable than that of Plato where they

conflict; Xenophon, though an able man of affairs, an intrepid military leader, and a literary stylist of some skill, was not a subtle philosopher. n150 Plato, by contrast, was of course a very great philosopher, and he is doubtless the best source we have for Socrates' life and activity. [*1557]

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n150. The best treatment of the entire issue of sources is found in Gregory Vlastos, Socrates: Ironist and Moral Philosopher (1991). For a discussion of Xenophon's testimony, see Terence Irwin, Book Review, 83 Phil. Rev. 409 (1974) (reviewing Leo Strauss, Xenophon's Socrates (1972)); Vlastos, supra, at 99-106.

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Using Plato as a source, however, poses other problems. Plato uses Socrates as a character in dialogues of varying dates, in many of which we have independent reason (Aristotle's testimony above all) to think him to be developing ideas of his own rather than Socrates'. Further complexity derives from the fact that in some of the works that are usually judged "Platonic" rather than "Socratic," there may be narrative and biographical material that gives genuine illumination about Socrates.

In brief, I solve this problem as Vlastos solves it - giving the Platonic Socrates pride of place where he and Xenophon do not agree and dividing the works of Plato into two groups: one that includes, more or less, the thinking of the historical Socrates, and another that represents Plato's own mature thought. In the former group I would place dialogues such as Apology, Crito, Laches, Lysis, Charmides, Protagoras, and Euthyphro; in the latter group, Symposium, Phaedrus, Republic, Philebus, Laws, and many others that will not concern us here. Unlike Vlastos (but like T.H. Irwin), I treat Gorgias as containing much material that may be called Platonic. Like Vlastos (and like Dover), however, I regard the portrait of Socrates' life and activity painted in the speech of Alcibiades in the Symposium as a genuine source for the historical Socrates, if used with proper caution, despite the presence of clearly Platonic doctrines in other portions of that dialogue.

What can we know about Socrates' attitude toward same-sex relations? Very little, as it turns out. In Plato's dialogues, Socrates takes his place in the "strongly homosexual ambience" of Athenian society. n151 Socrates' friends are routinely depicted as involved in erotic relationships with younger men, and he responds with sympathy to their situations. n152 Socrates himself is depicted as having strong sexual attractions to younger men; for example, he is "on fire, absolutely beside [himself]" when he looks inside the cloak of the young Charmides. n153 Though we know that Socrates was mar [*1558] ried n154 and had children, he never alludes to his or anyone else's marital sexual life, and his sexual interest in women appears generally to have been slight, so far as Plato's portrait is concerned. n155

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n151. See Dover, Greek Homosexuality, supra note 48, at 154.

n152. See id. at 154-58; Plato, Charmides 155c-e; Plato, Lysis 205d-06a; Plato, Protagoras 309a.

n153. Plato, Charmides 155d. There is a tradition - reported by Aristoxenus in the fourth century - that Socrates' heterosexual appetite was abnormally strong. See Dover Symposium, supra note 9, at 5. It is conspicuous that Plato does not represent this fact - which, of course, would not have been incompatible with unusually strong homosexual response.

n154. For the story that Socrates had a second wife on account of laws intended to remedy underpopulation, see Diogenes Laertius, Lives of Eminent Philosophers II.26.

n155. Socrates, however, does announce his attention to engage women as well as men in philosophical questioning when he reaches the underworld, where, presumably, women would be less secluded! Plato, Apology 41c. And he does, of course, converse with the learned Aspasia in Menexenus. See Plato, Menexenus.

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Did Socrates engage in male-male sexual relations? If he did not, did he have a general reason for this policy? If so, of what sort? Xenophon provides him with two general reasons against homosexual conduct, which Socrates is prepared to commend to others as well: the pleasures of sex can enslave reason; n156 and sexual gratification is "not a good thing" because it is something like scratching an itch, a way of relieving a tension, but not good in itself. n157 It is noteworthy that neither argument singles out homosexual activity for special blame: Xenophon's Socrates would presumably say the same of erotic passion generally, given the reasons he advances. It just happens that his friends are far more passionate about young men than about women, and so need more counseling in that regard. Nor do we hear any mention of a view that marital sex is in any way superior to other forms of sex, heterosexual or homosexual (although it is usually assumed that the husband would not be passionately in love with his wife and marriage would, to that extent, escape the blame reserved for passion). Finally, the blame involved does not include the idea that such copulation is wicked or depraved. Like the scratching to which it is compared, it may be inferior, but, as Dover says, " "Inferior' does not mean "wicked.' " n158

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n156. Xenophon, Symposium 3.8-14.

n157. See Xenophon, Memorabilia of Socrates at 1.2.29-30; see also Dover, Greek Homosexuality, supra note 48, at 159-60 (discussing Xenophon). Note the close resemblance of this argument to Socrates' argument against Callicles in the Gorgias. See Plato, Gorgias 494a-503d (Terence Irwin trans., 1979) [hereinafter Irwin Gorgias].

n158. Dover Letter I, supra note 48, at 2.

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As for Plato's Socrates, there is no clear evidence for a general attitude that Socrates is prepared to recommend to others. In several passages, Socrates insists through a metaphorical use of erotic language that his own most intense passion is for wisdom, a higher [*1559] goal that distracts him from the pursuit of bodily intercourse. n159 As Dover remarks, "It does not follow

logically from this that homosexual copulation should be avoided, unless one also believes that any investment of energy and emotion in the pursuit of an inferior end vitiates the soul's capacity to pursue a superior end." n160 Does Socrates think this? Note that even if he does, he would not be singling out homosexual copulation for special condemnation, and the grounds of his condemnation would not be that he finds the activity wicked or shameful. Again, "inferior' does not mean "wicked.' But does he think this? In Greek Homosexuality, Dover argues in the affirmative - but only by drawing on the Republic, an unquestionably Platonic rather than Socratic text, and by combining the evidence of Xenophon with that of Plato, n161 a method that I consider defective. Dover now grants my methodological point. n162

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n159. See Plato, Protagoras 309b-d.

n160. Dover, Greek Homosexuality, supra note 48, at 159.

n161. Id. at 159-60.

n162. Dover has written:

I accept the criticism that in [Greek Homosexuality] I ought to have drawn a distinction between Plato's Socrates and Xenophon's Socrates. I think there were two reasons why I failed to do so. One was my long habituation to thinking of Socrates in terms of the contrast between the Socrates of comedy and the Socrates of serious literature (Plato, Xenophon, Lysias, etc.); the other was that in [Greek Homosexuality] I was not primarily interested in the real Socrates, but simply in the views of homosexuality to be found in philosophical contexts, no matter to whom they were attributed. However, this is a suitable opportunity to sort things out.

Letter from Kenneth Dover, Chancellor, University of St. Andrews, to Martha Nussbaum 1 (Mar. 15, 1994) (on file with the Virginia Law Review Association) [hereinafter Dover Letter II].

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The primary piece of evidence we have for Socrates' views is the story told by Alcibiades in Plato's Symposium concerning his own failed attempt to seduce Socrates, in which Socrates sleeps all night beside the beautiful young man without evident arousal. n163 This story must be used cautiously as a source for the historical Socrates, given its context in an unquestionably mature Platonic dialogue and its close relation to other arguments of that dialogue. Nevertheless, scholars such as Vlastos, who insist on the distinction between Plato's Socrates and the historical Socrates as depicted by Plato, so use it. n164 What, then, does the story show if so used? It certainly does not show that Socrates was disgusted by Alcibiades' [*1560] proposal or thought the orientation of his desire diseased; he clearly treated the proposal as quite natural and normal. Nor does it offer any evidence that he thought the proposed conduct depraved or wicked, or different in kind from an attempted seduction by an attractive young woman (except that Greek society of the time probably would have seen Alcibiades' beauty as exceeding that of any woman). Socrates seems to have thought sexual relations inferior to his own abstinence, but for what reasons? Two are suggested in the passage. The first, as suggested in the

Protagoras, is that he felt the lure of philosophy so strongly that he simply did not get aroused by anything else. n165 The second reason is that he noticed Alcibiades' youthful vanity and wanted him to find out the hard way that he cannot get what he wants through good looks alone. Seducing this charismatic teacher would have turned Alcibiades straight away from philosophy; Socrates' refusal created a painful stimulus to self-examination. n166 In short, his reasons for refusal were internal to his conception of the value of philosophy and of his role as philosophical teacher. n167 There is no evidence here even for Xenophon's Socrates' general claim that sexual conduct is always inferior, a distraction from better pursuits. And [*1561] there is no evidence whatever, even in Xenophon, for Finnis' conclusion that Socrates "regarded homosexual conduct as intrinsically shameful, immoral and indeed depraved or depraving." n168

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n163. Plato, Symposium 216c-219e.

n164. See Vlastos, supra note 150, at 33.

n165. See id. at 40 ("A maxipassion keeps all the minipassions effortlessly under control.").

n166. See id. at 42 ("The irony in his love for Alcibiades, riddling from the start, persisted until the boy found the answer the hard way, in a long night of anguished humiliation, naked next to Socrates, and Socrates a block of ice.").

n167. Dover argues similarly:

Plato undoubtedly wishes to suggest that physical relations are inimical to the pursuit of metaphysical truth with the same partner on other occasions. This may not be true, and even if it is true not everyone will regard it as a good advertisement for metaphysics, but it is dictated by Plato's psychology ....

Dover Symposium, supra note 9, at 165 (commenting on 215a4). Because John Finnis and Robert George have repeatedly assailed my characterization of Dover's position, which was based on that passage and on my criticism of his conflation of Xenophon and Plato in Greek Homosexuality, see Finnis Rebuttal, supra note 39, 18; Rebuttal Affidavit of Robert F. George, 4-6, I now append a recent clarification from Dover:

In that passage of my Symposium commentary I did not intend any inference, positive or negative, to be drawn about the views of Plato's Socrates on homosexual copulation in circumstances where no philosophical teaching or co-operation is contemplated. Since he consistently assumes that homosexual temptation is universal, natural and normal (and in Charmides 155C-E he amusingly describes its impact on himself), we can hardly imagine that he regarded its consummation as "monstrous', "evil', "depraved', or any adjective stronger than would be applied nowadays to a heterosexual "lapse.'

Dover Letter II, supra note 162, at 1.

n168. Finnis Affidavit, supra note 25, 35. As for Xenophon's own attitudes toward homosexual conduct, see the excellent discussion in Dover, Greek Homosexuality, supra note 48, at 61-65, where Dover argues that "evidently

Xenophon did not think the impulse to those relations a blemish in a character for which he had an unreserved admiration," id. at 64. The worries about conduct expressed by Xenophon's characters focus on the issue of passion as threat to reason, not on any notion of intrinsic shamefulness, wickedness, or depravity.

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B. Plato

Plato is a philosopher of enormous complexity whose views about desire and appetite could occupy entire books, and often do. Because, in his suspicion of all appetitive pleasure in its relation to reason, he diverges more than any other Greek philosopher from the cultural pattern I have described, his views need to be probed with special care. Sensitivity is also required in posing questions about Plato's own relation to his varied characters; we are not entitled to assume that the character Socrates is the only one whose views we should connect with their author. n169 The ensuing remarks (complemented by Appendix 3) will be only a sketch of what the careful reader may find. In each case, I shall focus on three questions: (a) What, if anything, is said about homosexual conduct? In particular, is it singled out from other forms of sexual conduct as unusually shameful or depraved? (b) What, if anything, is said about Professor Mansfield's other concerns about the happiness of homosexuals and their social contributions? (c) What, if anything, is said about (heterosexual) marriage? Is there any sign of the positive view of the worth of procreative intercourse that Finnis attributes to Plato? I shall briefly treat all the dialogues about which claims were made in the trial, arranging them in what I take to be their chronological order. [*1562]

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n169. Ancient readers took the dialogue form very seriously. For example, Aristotle rarely speaks of views of Plato when citing the dialogues; he names the character. Moreover, he discusses very seriously some views not put forward by "the Socrates," (as he calls the character). See, e.g., Aristotle, Politics 1262b10-13.

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1. Gorgias n170

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n170. Recommended translation: Irwin Gorgias, supra note 157. This is far more literal and accurate than other translations, and the notes are excellent.

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Toward the end of this dialogue, Socrates is criticizing Callicles, who has held that the best life is the life with the largest desires, provided one always has the opportunity to satisfy them. n171 Socrates compares this to the wish that one always had the greatest possible itches, provided one always had the power to scratch. n172 In this and the succeeding series of examples, he tries to get Callicles to concede that no pleasure is per se valuable just because, like scratching, it replenishes a lack or removes an antecedent pain. n173 Eventually he will ask Callicles to think this way about the central bodily activities - eating, drinking, and sex. n174 A turning point in this argument is reached when, after Callicles has gamely tried to defend the scratcher's life as a good thing, Socrates provides a further example, the pleasure of the kinaidos. Callicles is outraged and tells Socrates he should be ashamed to mention such an example. n175 Finnis took this case, it would seem, as a reference to homosexual conduct in general. n176 But the kinaidos is clearly a person who chronically plays the passive role. Dover translates the term as "pathic." n177 In my published treatment of the dialogue, I used the phrase "passive homosexual," meaning someone who habitually plays the passive role. n178 More recently, I have been convinced [*1563] by arguments of the late John J. Winkler that kinaidos usually connotes willingness to accept money for sex, as well as habitual passivity. n179 I therefore rendered the word as "male prostitute" in my affidavit. In any case, there is no doubt that we are not dealing with an isolated act, but rather a type of person who habitually chooses activity that Callicles finds shameful. n180 That, and no view about same-sex relations per se, is the basis of his criticism. In fact, Callicles is depicted as having a young boyfriend of his own. n181 Socrates expresses no view of his own on these matters, although he seems to suggest that all appetitive activities, including eating and drinking, are inferior to activities (whatever they be) that do not simply relieve an antecedent tension or lack. Once again, "inferior' does not mean "wicked.'

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n171. Plato, Gorgias 491e-492a.

n172. Id. at 494c.

n173. Id. at 494d-495b; see also Nussbaum, supra note 8, at 142-44 (discussing the passage).

n174. Plato, Gorgias 495b-c.

n175. Id. at 494e7.

n176. At the conclusion of his general line of argument that homosexual conduct can never actualize a genuine good because it lacks "biological unity," Finnis writes: "Hence Plato's judgment, at the decisive moment of the Gorgias, that there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it." Finnis Affidavit, supra note 25, 48. It seems very dubious that any reference to masturbation is intended in the passage. Dover writes that he knows of "no explicit reference to masturbation in Plato or Aristotle." Dover Letter II, supra note 162, at 1 (arguing that if Plato had intended such a reference, Callicles' protest would have come at 494d1, rather than 494e7, after the reference to the kinaidos). I also note here that masturbation would have elicited protest for a different reason: it was thought to be a habit of

slaves who did not have the means to find a sexual outlet. See Dover, Greek Homosexuality, supra note 48, at 97.

n177. Dover Letter II, supra note 162, at 1.

n178. See Nussbaum, supra note 8, at 143.

n179. See Winkler, supra note 97, at 45-70. On the idea that addiction to this sort of pleasure will lead one to sell oneself, see id. at 57. Winkler stresses that the kinaidos is a scare-image defined contextually, usually as the polar opposite of the stout-hearted, patriotic, manly soldier. See id. at 45-54.

n180. Finnis accuses me of "inherent unreliability" on the grounds that I say one thing in my book and another in the trial. See Finnis Rebuttal, supra note 39, 17, 20. He interprets the book's term "passive homosexual" to mean a person who is anally receptive in a single act. See id. 20. All I can say is that if the statement in my book was indeed ambiguous enough to permit this interpretation, it should not have been; no scholar will doubt that a kinaidos is a type of person who habitually behaves as a pathic. And it seems reasonable enough that I should be allowed to learn from the work of others and modify my claims accordingly.

n181. Irwin Gorgias, supra note 157, at 481d. The boyfriend is named Demos, also the name for the Athenian "people," to whom Callicles is also devoted. It is likely that the pun on the name is sexual: as Callicles seduces Demos, so also the demos. (It would be assumed that he would practice intercrural intercourse with this boyfriend, thus avoiding putting him in anything like the kinaidos' shamed position.)

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The Gorgias contains no discussion of the marital bond.

2. Symposium n182

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n182. Recommended translations: Plato, Symposium (Alexander Nehamas & Paul Woodruff trans., 1989), and Plato, Symposium (John A. Brentlinger ed. & Suzy Q. Groden trans., 1970). For annotation in general, one should consult Dover Symposium, supra note 9.

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This dialogue is set at an all male drinking party attended by a group that includes pairs of lovers. n183 Its speeches express conven [*1564] tional views about love, most of which Plato depicts in an appealing and serious light. n184 The speech by Phaedrus points to the military advantages that may be derived by including male-male couples in a fighting force: because of their intense love, each will fight better, wishing to show himself in the best light before his lover. n185 Such an army, he concludes, "though small in size would

pretty well conquer all of humanity." n186 Shame is mentioned as a [*1565] motive closely connected, in a positive sense, with passionate sexual love: each will be ashamed of doing anything cowardly before his lover. n187 Phaedrus does mention two cases of marital love and self-sacrifice, giving high praise to the courageous actions of Alcestis, but he expresses some surprise that a male-female love could have the same features he finds in male-male love. n188

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n183. Pausanias is the erastes of Agathon. See Plato, Protagoras 315d-e; Plato, Symposium 177d, 193b7-c2. The relationship is historical, and was well known for its long duration: it is attested both when Agathon is eighteen and twelve years later, when Pausanias followed him to Macedon. See Dover, Greek Homosexuality, supra note 48, at 84; Dover Symposium, supra note 9, at 3. Intimacy between Phaedrus and Erixymachus is less clearly suggested. See Plato, Symposium 177a-d. Finnis asserts without evidence that all the relationships depicted in the dialogue are "intended by the author to be understood as consistent with Socrates' and his own firm repudiation of all forms of homosexual genital activity." Finnis Rebuttal, supra note 39, 19. Surely if Plato wished to make such a point he would hardly have introduced Pausanias as a character, as he not only is well known for a sexual relationship but gives the rationale for it eloquently in his speech. See Plato, Symposium 180d-189c. Dover remarks, justly, that the language of serious Greek literature is "always circumspect" in matters of sex, but that this should not mislead the reader: "The ultimate "service' or "favour' desired by the older male is bodily contact leading to orgasm, though no doubt a smile or a friendly word would be treasured by the besotted lover as an interim favour." Dover Symposium, supra note 9, at 3.

n184. Thus, I would argue that only Agathon's speech is made fun of and shown to be intellectually bankrupt. All the others are presented seriously and some express aspects of Plato's own most serious convictions. See Nussbaum, supra note 8, at 165-99. Pausanias' speech clearly expresses well-established social conventions from which Plato derives, elsewhere, much insight: the view expressed by Socrates in the Phaedrus has much in common with it, though it also modifies it. See Plato, Phaedrus 237b-38c. On the seriousness of Pausanias' speech, see supra text accompanying note 93. Finnis remarks apropos of Aristophanes' speech that "every reader of that dialogue is aware that the views of that character are not Plato's." Finnis Rebuttal, supra note 39, 19. I do not know from where Professor Finnis derives his special knowledge of Plato's intentions, but he is just wrong to think the issue self-evident. I have argued at length for the view I took in the trial, and we may note that the ancient thinkers did not read Plato the way Finnis does, on the whole. Aristotle, for instance, refers only to Aristophanes' speech when discussing the dialogue, and the Greek Stoics have been plausibly held to base their view of eros on Pausanias' speech, see Brad Inwood, Why Do Fools Fall in Love? (paper presented at the Brock Philosophical Society conference, Feb. 10, 1994) (unpublished manuscript, on file with the Virginia Law Review Association).

n185. See Plato, Symposium 178d-179b.

n186. Id. at 179a. This is likely to be a reference to the well-known Sacred Band of Thebes, formed around 378 B.C. Dover argues that the dialogue must have been composed after that date, because Phaedrus describes the idea in "entirely hypothetical terms." See Dover Symposium, supra note 9, at 10; K.J. Dover, The

Date of Plato's Symposium, 10 Phronesis 2 (1965). But Plato more than once plays on the gap between dramatic date and date of composition, making his characters hint at things that, by the date of composition, would have been known to be reality. Thus, the Republic's allusions to the abuse of justice by those seeking power, on the part of characters who somewhat after the dramatic date would have been embroiled on opposite sides of a bitter political struggle with those very features, would have been heard by its audience to contain ironic reference to those events, which had in the mean time occurred. Similarly, in the Charmides, that characters known to the audience for their lack of moderation are shown (at a dramatic date well before the relevant events) calmly discoursing on moderation would very likely be read as containing ironic reference to those well-known (to the reader) events. I believe that the reference here is like that: Phaedrus, at the dramatic date 416 B.C., refers in entirely hypothetical terms to what an audience of the 370s would know to be a current reality. Dover now accepts this point. See Dover Letter III, supra note 35, at 2.

n187. See Plato, Symposium 178e.

n188. "And indeed lovers are the only ones who are willing to give their lives - not only the males, but even women." Id. at 179b. It is culturally interesting that Alcestis is depicted as the erastes of her husband, though no doubt she was imagined as younger and as behaving sexually in the usual female way. Id. at 179b-180d. The reason seems to lie in the intensity of her love, as contrasted with her husband's self-absorption, so Phaedrus maps them onto the erastes-eromenos dichotomy in a way that makes this distinction paramount and the sexual role secondary.

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The speech of Pausanias - convincingly argued by Dover to be one of our central pieces of evidence for prevalent Athenian attitudes n189 - criticizes males who seek physical pleasure alone in their relations with younger males, and praises those who seek deeper spiritual and moral goals. Strong interest in sex with women is connected by Pausanias with a preference for the body over the soul. n190 A sexual act, says Pausanias, like any other act, is not right or wrong in and of itself: everything depends on the manner in which it is done. n191 If the erastes demonstrates that his primary concern is for the character and education of the eromenos, rather than merely for bodily pleasure, then it will be a fine or noble thing (kalon) n192 for the younger man to "gratify" (charizesthai, a word [*1566] that, as Dover has shown, connotes intercourse) n193 the older. Such a lover should look for a young man whose beard has already started to grow, as that is the age of good judgment. n194 After all, the goal is "to love as people who are going to be together their entire lives and to live together," n195 and this goal requires careful selection. The young man should not let himself be caught too quickly, because he must test the lover's character and regard for his education. n196

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n189. See Dover, Greek Homosexuality, supra note 48, at 12-13, 81-84.

n190. See Plato, Symposium 181b-c.

n191. See id. at 180e, 183d.

n192. Dover points out that kalos sometimes means just "okay," "in order," "(perfectly) all right," etc. See Dover Letter III, supra note 35, at 2. I am happy enough with this. But in a dialogue whose central topic is the kalon, and in which the high moral connotations of the word that are common in Platonic philosophy predominate, I would still be inclined to render the terms as I have. This is certainly the only way to translate the term consistently throughout the dialogue, something that translators have on the whole rightly sought, despite the dialogue's plurality of speakers.

n193. See Dover, Greek Homosexuality, supra note 48, at 44-45; Dover Symposium, supra note 9, at 3.

n194. Plato, Symposium 181d.

n195. Id.

n196. See id. at 184a-b.

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Pausanias is aware of a variety of different customs regarding male-male intercourse. He makes fun of regions where it is held always to be a good thing to "gratify" a lover, without regard to the moral concerns he has enumerated. This custom, he says, suits unrefined people who lack the capacity to persuade one another of virtue and good intentions. n197 But he also condemns the opposite custom and, more strongly, associates it with Asian despotism. He mentions that tyrants will sometimes promulgate the view that same-sex relations are shameful, in order to discourage the sort of devotion to political liberty that such relations, as exemplified by Harmodius and Aristogeiton, can foster. n198 Marriage plays no part in Pausanias' thinking, except when he mentions laws that forbid sleeping with other people's wives. n199 It would be assumed, however, that the relations he describes could be compatible with marriage on the part of the erastes. The lovers Pausanias describes are both happy and socially responsible.

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n197. See id. at 182b.

n198. See id. at 182b-c.

n199. See id. at 181e.

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Because Eryximachus' speech is concerned more with cosmology than with human beings, I omit it. Aristophanes' speech I have already described: it situates same-sex longings deep in nature, describes intercourse as a way of being restored to a natural wholeness and unity, and argues for the civic benefits of male-male love in particular. n200 There is absolutely no doubt that lovers of all three types are envisaged as engaging in intercourse which, in fact, [*1567] is a central topic of the speech. Although the speech does recognize the distinction between the erastes and the eromenos, it is remarkable for its suggestion of mutual desire and pleasure: both partners feel "friendly love and intimacy and passionate love," n201 and the younger "halves" of original

male-male "wholes" are said to enjoy "lying with and being embraced by men." n202 Indeed, the whole conceit of the myth leads the mind in the direction of an uncustomary symmetry and reciprocity. Relationships between "other halves" are said to endure throughout life. n203 Aristophanes remarks that custom may force such male-male couples to marry. Such couples, however, "do not turn their thoughts to marriage and begetting of children by nature ..., but it is enough for them to live unmarried with one another." n204

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n200. See supra notes 9-11 and accompanying text.

n201. Plato, Symposium 192b-c.

n202. Id. at 192a.

n203. See id. at 192c.

n204. Id. at 192a-b.

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Agathon's speech contains little to interest us. Socrates' speech recounts a process of religious-mystical education in which male-male love plays a central guiding role. n205 Whether it is abandoned when one reaches the summit of philosophy's vision - and Anthony Price has now convinced me that it is not n206 - this erotic bond offers a primary insight and inspiration into the nature of the good and beautiful. The speech argues that a preference for women and marriage betrays an inferior type of creativity, focused on bodily rather than spiritual goals: these people want offspring of the body, rather than the mind and character. n207

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n205. As is often the case in Plato, we simply do not know whether some of the insights developed using this example might be intended to be generalizable to male-female and female-female loves as well.

n206. See A.W. Price, Love and Friendship in Plato and Aristotle 15-54 (1989). Price argues that a type of close personal intimacy characterized by "educative pederasty" is present throughout the ascent. Id. at 47-49. By "pederasty" Price means something quite different from pedophilia, sex with young children; he means sex with adolescents of (roughly) college age.

n207. See Plato, Symposium 208e-09a; see also Dover, Greek Homosexuality, supra note 48, at 163 (discussing the passage). See generally Gregory Vlastos, Platonic Studies 1-42 (1981) (discussing "the individual as the object of love in Plato").

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Will the lovers in the Socratic ascent have sexual intercourse? Certainly, as they fix their minds increasingly on the whole of beauty, rather than simply on individual exemplars of beauty, the [*1568] tension and strain involved in erotic passion will cease. Socrates' imaginary instructor Diotima remarks

that Socrates will no longer have to pursue the young men that now "strike you out of your mind." n208 She uses the language of sexual "being-with" for the aspiring philosopher's relation to the eternal form of Beauty, n209 having used it earlier for his relation to those same young men. n210 Again, it is implied that a new form of intercourse displaces the old as the object of the philosopher's most intense interest. One could, of course, imagine intercourse continuing without intense passion. But the result is likely to be the stonelike, unaroused Socrates of whom Alcibiades so bitterly complains, n211 feeling Socrates' unresponsiveness as a kind of rape. n212 I have argued that the reader of the dialogue is intended to feel more than a little ambivalent about a proposal in which so much of human passion is given up, and intended to feel, therefore, some sympathy with Alcibiades' preference for flesh-and-blood intercourse. n213 Through appeals to empathy in both Aristophanes' and Alcibiades' speeches, the text recalls to its reader the world of ordinary Athenian judgments, making clear the costs, as well as the benefits, of Diotima's therapy. But even if we disregard that issue, as we should not, and give Socrates the final word in a simple way, his argument in no way reflects the view that homosexual conduct is depraved, wicked, or shameful. It is at least as good as any other sort of sexual conduct, though all such intercourse may be uninteresting once one "has intercourse" with the form. [*1569]

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n208. Plato, Symposium 211d.

n209. See id. at 211d (sunontes).

n210. See id. at 212a (sunontos).

n211. Plato, Phaedrus 255a-56b.

n212. Plato uses hubrisen. Plato, Symposium 219c5. On these metaphors, see the excellent treatment in Michael Gagarin, Socrates' Hubris and Alcibiades' Failure, 31 Phoenix 22 (1977). Alcibiades' charge against Socrates seems unfounded, for being used seems an essential feature of rape, and Socrates has humiliated him in a way that expresses not only no intent to use, but probably also a sincere concern for his well-being.

n213. See Nussbaum, supra note 8, at 195-99.

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3. Republic n214

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n214. I would date this work very close to the Symposium. Recommended translations: Shorey Republic, supra note 56; Plato, The Republic of Plato (Allan Bloom trans., 1968) [hereinafter Bloom Republic]; Plato, The Republic (Paul Shorey trans.), in The Collected Dialogues of Plato (Edith Hamilton & Huntington Cairns eds., 1961). Bloom's notes are not a good guide to the

argument, but his translation is the most literal to be found. For Book V (which contains a lot of the material about women and marriage), the best translation, with first-rate commentary, is Plato, Republic V (S. Halliwell trans., 1993) [hereinafter Halliwell Republic V].

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In this work and the roughly contemporaneous Phaedo, we first encounter in a clear form that suspicion of all appetitive expression that will figure so largely in Plato's thought after this time. The appetitive element in the soul - the one that is responsible for eating, drinking, and sexual activity - is compared to an insatiable "many-headed beast" whose demands grow the more they are gratified n215 and whose pursuits are a constant threat to good reasoning. n216 People who live by their appetites are said to resemble animals, "like cattle ... they pasture, grazing and mounting." n217 Although the sexual appetite is singled out as the greatest, sharpest, and most "madness-producing" of the appetites, n218 the three major appetites are treated in tandem throughout the work, n219 and Plato's strictures apply to them all. In a passage in which Socrates is making proposals for the control of the dangerous erotic appetite, he suggests that in the Ideal City, if the eromenos can persuade the erastes, the erastes should kiss the eromenos and touch him as a father would a son, "for the sake of the fine" (presumably, to encourage his educational development), but go no further: "if not, he will incur the blame of being uncultivated and lacking comprehension of the beautiful." n220 This, of course, is far from Finnis' claim that these sexual relations will be regarded as shameful and depraved. Furthermore, Plato's argument is altogether different from Finnis' argument, as it applies perfectly to all sexual relations, especially those accompanied by real passion. [*1570]

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n215. Plato, Republic 442a.

n216. See id. at 436a, 583c-84a, 533c, 586a-b; see also my own account of these familiar issues in Nussbaum, supra note 8, at 136-64, 200-33.

n217. Plato, Republic 586a.

n218. Id. at 402c.

n219. See, e.g., id. at 580e.

n220. Id. at 403b-c (amousias kai apeirokalias).

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Notice as well that there is no mention of what men will and will not do outside of the erastes/paidika relation, which was of special concern to Plato because of the intensities of passion to which it typically gave rise. For example, we are not told that males will not make love with both male and female prostitutes, as in most Greek cities they could routinely be expected to do. This activity would presumably have been seen as a smaller danger than intercourse with the eromenos, given that, rather like eating a boring meal, it would be done for release only, and not with passion. In the Phaedo, Plato does seem to take the position that the wise man will not have sexual intercourse

at all, but in the Republic he follows a milder program, permitting indulgence in all the appetites "up to the point of health and well-being." n221 Given the tight restrictions on potentially procreative sex that are mandated by Plato's eugenic schemes, n222 it seems logical to suppose that some form of sex for release, presumably with male or female prostitutes, n223 would be permitted. As for the positive side of Finnis' sexual program, it is nowhere to be found in a work that sets out in a relentless manner to extirpate the traditional family and the traditional bonds of marriage that sustained it.

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n221. See id. at 558d-59c (mentioning sexual intercourse after eating and drinking). This passage is in the middle of the discussion of the oligarchic city and man, but it is introduced as a digression, necessary to clarify a concept that will be used in that discussion. There is no reason to think that Socrates' articulation of the concept of "necessary desire" itself holds good only for the oligarchic city. He says simply that such desires "might justly be called necessary." Id. at 558e.

n222. The best treatment of these, with all their contradictions, is in Halliwell Republic V, supra note 214.

n223. Sex with the latter would be permissible only if Plato thought the contraceptive devices in use at the time could be relied on. See infra Appendix 3 for his concern about contraception. Masturbation would be another possibility, but I am not certain that the term aphrodisia could, without strain, designate masturbation.

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4. Phaedrus n224

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n224. Recommended translations: Plato, Phaedrus (C.J. Rowe. trans., 1986) [hereinafter Rowe Phaedrus]; Plato, Phaedrus (R. Hackforth trans., 1952). Hackforth is more eloquent and still very close to the Greek; Rowe's aim is to produce a literal version for use with the Greek.

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The dialogue contains a praise of the intellectual, political, and spiritual benefits of a life centered around male-male love, with considerable stress on the positive role of bodily desire in awaken [*1571] ing the personality to its highest aspirations. It begins with Phaedrus reading to Socrates a speech allegedly written by the well-known orator Lysias. n225 The speech argues that a young man should give his sexual favors not to a person who is passionately in love with him, but to one who is not in love with him. The argument plays cleverly on tensions and paradoxes inherent in Athenian conventions of the time. n226 When the speaker holds up the advantages of an alliance that is based on excellence and friendship on one side, and on interest in one's education and

advancement on the other, he utters familiar truths. When he argues that these advantages are more likely to be present when the erastes is not passionately in love with the younger man but is "in control of [himself]," n227 he does not say something implausible, for his observations concerning the instability and inconstancy of eros would themselves have seemed to the audience familiar truths. On the one hand, then, the advice to avoid the passionate suitor and to gratify the nonpassionate one seems eminently sensible; n228 on the other hand, to do so leaves out the wonder and divinity of eros, which the Greeks strongly felt, even though they recognized its dangers. n229

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n225. Plato, Phaedrus 230e-34c. Scholars are not agreed on whether the speech is a real speech by the historical Lysias or a Platonic invention that captures Lysias' style well. I am inclined to the latter view.

n226. See id. Notice that "Lysias" begins from the realistic assumption that an attractive young man with many suitors will "gratify" one of them, the only question being which one. Rightly or wrongly, he treats the question "Shall I at all?" as already resolved.

n227. Plato, Phaedrus 233c; cf. id. at 232a (praising those who are in control of themselves as choosing what is right without regard for what others think of them).

n228. One might here register another complaint against A.E. Taylor, see supra note 48, who writes: "The thesis of Lysias, we must remember, would be an offensive paradox even to the section of Athenian society which practised "unnatural' aberrations." A.E. Taylor, Plato: The Man and His Work 302 (1960).

n229. One excellent place to study this is Euripides' Hippolytus, in which eros is depicted as bringing an extraordinary mixture of beauty and danger to human life, and in which the hero's decision to avoid its claims is shown to be both impious and impoverishing.

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After giving his own version of "Lysias' " argument, Socrates tries to leave. n230 He is stopped by his famous daimon, who always stops him when he is going to do something bad. It would be bad, Socrates acknowledges, to leave the blame of eros unretracted. He now proposes to "purify" himself before eros, whom he asserts to [*1572] be a god, n231 by uttering a speech of recantation. n232 The moving and beautiful speech that follows argues that some forms of "madness" can be the source of the greatest good for human beings and that, among these, the madness of love is the best. n233 The arousal of the soul by a visual response to bodily beauty - a response that is described in unambiguously sexual terms and characterized as involving "the entire soul," n234 engaging both its appetitive and its rational elements - is said to be a crucial step in the soul's progress toward insight and metaphysical understanding. n235 The awakening is imagined throughout as that of an older man awakened by the beauty of a younger man; Socrates argues that the highest form of human life is one in which a male pursues "the love of a young man along with philosophy." n236 He describes the experience of falling in love with moving and erotic language, rich in imagery of receptivity as well as activity: he speaks of being melted, being watered, even drawing a stream of desire into oneself as through an

irrigation trench. n237

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n230. Plato, Phaedrus 241d-242a.

n231. Id. at 251a. This is in contrast to the Symposium, which denies the divinity of eros. See Plato, Symposium 204a-c. A more extensive argument on this and related issues appears in Nussbaum, supra note 8, at 200-33.

n232. Plato, Phaedrus 243d-45c.

n233. Id. at 245c, 248d.

n234. Id. at 251b-d.

n235. See Dover, Greek Homosexuality, supra note 48, at 163-65 (commenting on the extraordinary emphasis given to the erotic response to bodily beauty in Plato's metaphysical system). In his forthcoming autobiography, Dover comments further on this theme, in a manner that makes evident the wide difference between his own moral intuitions and those of Finnis. See Kenneth J. Dover, Marginal Comment (forthcoming Nov. 1994).

n236. Plato, Phaedrus 249a.

n237. See id. at 251e.

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Nor is passionate arousal a mere stage in the soul's progress: it gives rise to an enduring relationship in which physical infatuation is deepened by conversation and the pursuit of shared spiritual goals and in which the "mad" lover's state gives rise to generous and stable friendship, rather than to the dangers of which "Lysias" warns. n238 Most remarkable of all, it also gives rise to a reciprocation of sexual desire on the part of the younger man n239 who, taking [*1573] note of the unparalleled generosity of his lover, finds himself suffused with a stream of desire from "the source of that stream that Zeus, in love with Ganymede, called "passionate longing.' " n240 The younger man conceives a longing and desire for his erastes, "having a "reciprocal-love' [anteros] that is a replica of the other's love." n241 But he calls it, and thinks that it is, philia rather than eros. He has desire similar to the other's, albeit weaker, to see, to touch, to kiss, to lie with him. n242 Recall that Greek homosexuality conventionally involves reciprocity of a sort, for the eromenos receives kindliness and education in return for his beauty. Here the language indicates the culturally unusual nature of the proposal, for the young man lacks a word for his own desire. Plato, thus, constructs a more thoroughgoing understanding of reciprocity, extending to the body's longing for beauty. n243 The relationship is envisaged as a long-lasting one, in which the erastes and eromenos "associate with touching in the gymnasia and in other places of association." n244

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n238. See id. at 255a-b.

n239. See David M. Halperin, Plato and Erotic Reciprocity, 5 Classical Antiquity 60 (1986); see also David M. Halperin, Plato and The Metaphysics of Desire, 5 Proceedings of the Boston Area Colloquium in Ancient Philosophy 27 (1989) (tracing eros in Plato to a general kind of longing not limited to sexual desire); Martha C. Nussbaum, Commentary on Halperin, 5 Proceedings of the Boston Area Colloquium in Ancient Philosophy 53 (1989) (examining the evidence for connecting eros more specifically to sexual desire and arguing that eros was standardly regarded as divine and therefore an important part of human life).

n240. Plato, Phaedrus 255c. What is at issue is a complicated etymological play on the word himeros, or "passionate longing." Himeros has been etymologized as deriving from "particles" (mere) that "flow" (rhein) from the beloved to the lover. See id. at 251c. The dialogue is suffused with this sort of word play, much of it erotic. See id.; cf. Plato, Cratylus 419e (using similarly expressive and erotic language).

n241. Plato, Phaedrus 255d.

n242. See id. at 255e.

n243. Such reciprocity was not unknown before this - Socrates describes the experience as one that is likely to follow upon the young man's perception of his lover's generosity - but what is clear is that the cultural vocabulary lacks a description for it.

n244. Plato, Phaedrus at 255c.

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Plato expresses views about this touching that may seem to a modern audience rather peculiar. He strongly endorses the lovers' bodily desire as god-sent and good when it is a response to the way in which a body manifests traces of the soul within. n245 Thus, like Pausanias, n246 he does not endorse desire that stops short at the body's surface, so to speak. The dialogue is remarkably erotic, and commentators of many different types have responded to it, rightly, [*1574] as marking a new stage in Plato's attitude toward the passions. n247 The part of the soul that represents its emotions is imagined as good, motivated by reverence and awe for the body's beauty. n248 And, Plato contends, this arousal by bodily beauty is a crucial stage in starting the soul's progress to truth and understanding. n249

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n245. See id. at 251a.

n246. See Plato, Symposium 181b.

n247. For an excellent treatment of the shift from Republic and Symposium to Phaedrus in this respect, see Vlastos, supra note 207, at 11-34, app. 2 at 38-42; see also Dover, Greek Homosexuality, supra note 48, at 164-65 (describing the persistent sexual imagery of the Phaedrus); Nussbaum, supra note 8, at 200-33 (discussing the dichotomy between madness and reason in the dialogues); Price, supra note 206, at 55-102 (discussing love in the Phaedrus).

n248. See Plato, Phaedrus 250d-252b.

n249. See id. at 251a-57a.

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Yet the familiar Platonic suspicion of bodily appetites remains, producing the thesis that, in their search for metaphysical insight, it will be best for the contemplative couple to refrain from orgasmic gratification, although they may regularly satisfy their bodily desire in caresses that stop short of orgasm. n250 Once again, Plato's reasoning seems to be that orgasmic gratification derails the soul from its pursuit of wisdom and also, it seems, from reverence toward the image of divinity within the younger partner. In effect, he seems to assert in the Phaedrus, as he did in the Republic, that one must starve one part of the soul in order to feed another. His reasoning applies perfectly to all sexual activity in general, and does not single out homosexual activity in particular, except for special praise and interest. (Procreative sex is quickly dismissed in a sentence, as the occupation of people deficient in spirituality, rather like animals.) n251 Furthermore, Plato shows much sympathy for couples who continue to have full intercourse from time to time and who think of this intercourse as a central element in their relationship. n252 These lovers, too, will recover their wings and reenter the heavens, "so that they carry off no small prize for their erotic mad [*1575] ness." n253 They "will live in the light and be happy traveling around with one another, and will acquire matching plumage, when they acquire it, because of their love." n254 Those who have avoided this sort of love will be condemned to "roll around and beneath the earth for nine thousand years." n255 Plato is very likely wrong to think that sexual activity derails aspiration and even reverent emotion. Nonetheless, as his depiction of the afterlife rewards of the sexually indulgent couples shows, the views Plato does hold do not come close to the belief that homosexual conduct, as such, is inherently shameful and depraved. Yet again, "inferior' clearly does not mean "wicked.'

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n250. See id. at 256c.

n251. See id. at 250e.

n252. Plato writes of couples "thinking that they have given and received the greatest pledges." Id. at 256d. Along with Price (following a suggestion by Edward Hussey), I interpret this line as referring to the couples' sex acts, which they believe (wrongly) to be the greatest thing they have exchanged with one another. See Price, supra note 206, at 93 n.60 (criticizing Dover, Greek Homosexuality, supra note 48, at 163 n.16, for taking the "pledges" as a reference to the rest of their relationship and their "thinking," therefore, to be correct). Dover now accepts correction on this point. See Dover Letter III, supra note 35, at 3.

n253. Plato, Phaedrus 256d.

n254. Id. at 256d-e.

n255. Id. at 256e-257a.

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I must now confront one remaining issue: the occurrence of the difficult phrase "contrary to nature" in an obscure description of sexual activity in the Phaedrus. The sentence reads as follows:

The one who has not been recently initiated or whose vision has become corrupted is not sharply carried toward the vision of beauty-in-itself when he sees its earthly counterpart, so that he does not revere it when he looks on it, but, giving himself over to pleasure, attempts to mount in the manner of a four-footed beast and to beget children, and associating with wantonness he neither fears nor is ashamed to pursue pleasure contrary to nature. n256

Two things can be insisted on from the start. First, the reference to begetting children is really that, rather than a more general reference to ejaculation. This has been convincingly argued by Dover, who also points out that the picture of one mounting like a four-legged animal would not surprise the Greeks, who by preference depicted (and no doubt practiced) heterosexual copulation in the a tergo position. n257 Second, Plato is describing not two distinct types of people, but a single type: the person described throughout the passage is the same person who acts "contrary to nature." Also [*1576] clear, in general terms, is that this type of person is one who pursues only bodily pleasure, a type resolutely condemned not only by Plato but by Greek cultural norms.

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n256. Id. at 250e.

n257. Dover, Greek Homosexuality, supra note 48, at 163 n.15 (disagreeing with Vlastos, supra note 207, at 25 n.76, who takes the opposite view); cf. Rowe Phaedrus, supra note 224, at 184 (taking Plato to mean that the act is contary to nature "because it is the pleasure of an animal, not a man"). I would add that in Book IX of the Republic, "mounting" is used as a general description of animalistic sexual activity, just as "grazing" is used of animalistic eating. See Plato, Republic 586a-b.

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What, however, is meant by the reference to "contrary to nature"? Commentators have been quick to interpret the passage in some moral sense, in light of modern ideas regarding the "unnaturalness" of homosexual copulation. n258 Dover, with greater sensitivity to historical context, reads the phrase in light of the appeal to the behavior of animals in Plato's Laws, n259 which, as we shall see, is itself by no means easy to understand. In Greek philosophy, the appeal to nature is a very slippery topic. n260 To say that something is "in accordance with nature" may indeed mean that it is "in accordance with the behavior of other animals." But such appeals to the animal kingdom are typically associated with hedonism and immoralism - they are so associated by Plato, who ascribes such appeals to Callicles and Philebus, in defense of their self-serving hedonistic programs. n261 Other prominent examples include the son Pheidippides in Aristophanes' Clouds, who learns from his newfangled philosophical education that appeals to the animal world can help him justify beating his father. To the son's gleeful assertion that the rooster fights its

father, the father replies, "Why then, since you imitate the rooster in everything, don't you eat shit and sleep on a perch?" n262 - a good question, and one with which Plato would have sympathized. In dialogues as diverse in date as Gorgias, Republic, and Philebus, he shows himself to be resolutely opposed to such appeals to the animal kingdom, on the grounds that they would establish norms for an ethical thinking creature by appeal to the behavior of a nonthinking creature. n263 In the Philebus he concludes that an appeal to the animal world does [*1577] indeed support a hedonist thesis n264 but that we will not give such a form of life the first place

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n258. See, e.g., Vlastos, supra note 207, at 25, cited approvingly by Finnis in Finnis Article, supra note 25, at 1057.

n259. See, e.g., Plato, Laws 636a-c.

n260. For one sensitive exploration of a passage using "nature" in the context of homosexuality, see Dover, Greek Homosexuality, supra note 48, at 60-63. I would argue that Dover has not read the Phaedrus passage with the same sensitivity to context and argument.

n261. See Plato, Gorgias 483c8-484c; Plato, Philebus 67b.

n262. See Aristophanes, Clouds 1421-32. There are many similar examples. For a good overview of the "nature/convention" debate, see 3 W.K.C. Guthrie, A History of Greek Philosophy 99-101 (1969).

n263. See Plato, Republic 586a-b.

n264. What is probably at issue here is the hedonism of Eudoxus, whom Aristotle reports to have argued that pleasure is the supreme good by appealing to the behavior of "all creatures, both those endowed with reason and those without it." See Aristotle, Nicomachean Ethics 1172b9-11.

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even if all the cattle and horses and all the other beasts speak in its favor by their pursuit of pleasure - creatures trusting in whom, as diviners trust their birds, the many judge that pleasures are the most important thing in living well, and they think that the passionate loves of beasts (tous therion erotas) are authoritative witnesses, rather than the loves of those arguments that are divined on each occasion by the philosophic muse. n265

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n265. Plato, Philebus 67b.

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Nor do nonhuman animals fare well in the Phaedrus itself: Socrates holds that a soul that saw nothing of the eternal Forms would be put into an animal body, because being human requires the intellectual grasp that only a sight of the Forms would deliver. n266 The people described in 250e of the Phaedrus, then, are humans who are on the borderline of the human/animal divide, incapable of the loves of those who are farther away from the beast. So it would be very odd to find their sexual behavior criticized on the ground that it is not animalistic (and of course the child-begetters have just been criticized precisely on the ground that their behavior is animalistic). n267 I might add that the term phusis is used elsewhere in Socrates' speech not to designate the animal kingdom, but to designate the specific "nature" of the divinity within each human n268 and the "nature" of the beauty that each pursues. n269

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n266. See Plato, Phaedrus 248d, 249b.

n267. See id. at 250e.

n268. See id. at 253a1.

n269. See id. at 254b5-6.

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The best solution to this problem seems to be the one offered by Christopher Rowe and now accepted by Kenneth Dover: the pleasure of these people is "against nature" "because it is the pleasure of an animal, not a man." n270 In other words, it is against their specific nature as humans (which Plato understood in a particularly intellectualistic way). This makes the criticism a unity: both in [*1578] child-begetting and in other sexual activity, the person described behaves like an animal in that he pursues pleasure without an interest in the soul.

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n270. Rowe Phaedrus, supra note 224, at 184; see also Dover Letter III, supra note 35, at 3 (praising Rowe's suggestion as "certainly excellent").

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But what other sexual activities are mentioned in the second part of the sentence? Are they both heterosexual and homosexual, exclusively heterosexual, or exclusively homosexual? There seem to be three possibilities. The sentence means: "he begets children and in so doing wantonly pursues pleasure in an animal fashion;" or "he begets children and in general wantonly pursues pleasure in an animal fashion in all of his sexual activities;" or "he pursues pleasure animalistically with women, begetting children, and also animalistically with men, having sex for pleasure only, unconstrained by shame and reverence for the soul." The third reading seems to me preferable, especially because one and the same person, or one type of person, may well be envisaged in both roles, as it was standard to think of hedonism and wantonness as giving rise to an indiscriminate pursuit of both females and males. n271

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n271. See, e.g., Plato, Symposium 181b (speech of Pausanias). Price now defends the first possibility. Letter from Anthony Price, Lecturer in Philosophy, University of York, to Martha Nussbaum 2 (May 12, 1994) (on file with the Virginia Law Review Association) [hereinafter Price Letter II].

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What we have, then, is a commonplace of the culture, given new Platonic sharpness: a stern criticism of the hedonist, who in all his sexual acts behaves like an animal, indifferent to the soul. The departure from standard cultural norms consists in understanding child-begetting itself as a merely animal act, but this is to be explained by Plato's tendency to equate human nature with intellectual form-seeing nature. None of this implies that all homosexual copulation is "contrary to nature" in some normative sense; indeed, that suggestion would be hard to square with Plato's treatment of the intercourse of the second-best couples.

In short, the Phaedrus offers a stirring defense of male-male desire and love and gives an extraordinary role to erotic love within the life of philosophical aspiration. Full genital intercourse is viewed with standard Platonic suspicion, but this suspicion involves no particular condemnation of homosexual relations; other types of sex fare worse. Finally, bodily acts stopping short of orgasm are endorsed in vivid and moving terms. [*1579]

5. Laws n272

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n272. The best - i.e., most faithful - available translation is Plato, The Laws of Plato (Thomas L. Pangle trans., 1980) [hereinafter Pangle Laws]. Even this translation has serious deficiencies, however; an entirely new translation is needed.

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It is sometimes thought that in the Laws Plato offers a general condemnation of homosexual relations in a way that singles them out for special moral blame. Even if this were true, it would signify, at most, only that he had changed his views, and we would have to look for his reasoning. n273 But I believe that once we establish the Greek text of the two problematic passages in the most accurate way - a difficult paleographical and text-critical challenge - and peel away layers of mistranslation and overtranslation, the situation looks different. Because of the technical problems raised by the interpretation of the material, I defer full examination of the passages to Appendix 3. But I summarize my conclusions briefly:

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n273. In any case, it is certainly wrong to assert that "to know or tell Plato's views on the morality, the immorality, of all such nonmarital conduct as homosexual sex acts, one need go no further than these unmistakably clear passages in the Laws, texts with which every other text of Plato can readily be seen to be consistent." Finnis Article, supra note 25, at 1061.

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(1) Plato's overall worry is, once again, about bodily pleasure generally and its ability to take over the personality, disrupting reason. n274 In addition, he appears to have a special worry about the loss of male bodily fluids that are important for reproduction, in connection with his persistent worries about population. n275

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n274. See Dover, Greek Homosexuality, supra note 48, at 167 ("Plato's main concern is to reduce to an unavoidable minimum all activity of which the end is physical enjoyment, in order that the irrational and appetitive element of the soul may not be encouraged and strengthened by indulgence ...."). Plato spends at least as much time on drunkenness as on sex.

n275. Dover suggests that loss of semen plays such a large role in folklore and psychopathology that one may wonder whether Plato thought that semen was a nonrenewable resource. Dover Letter III, supra note 35, at 3.

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(2) Homosexual conduct is not singled out for special blame; the final law regulates all forms of extramarital activity. Furthermore, Plato views married sex more favorably not because it is thought to be better morally, but simply because it is necessary for the city. n276 [*1580]

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n276. Plato does not always distinguish between these two categories, but he is capable of doing so, as in the notorious discussion of the rule of the Ideal City by the philosophers, a task they view "not as something fine [kalon], but as a necessity." See Plato, Republic 540b.

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(3) Insofar as Plato devotes particular attention to homosexual relations, it is because he thinks they are especially powerful sources of passionate stimulation, not because they are thought to be especially depraved or shameful. n277 The criticism of those who indulge in the active role is that they are intemperate and overindulgent, not that they are wicked. Nor does Plato suggest that the desire for such relations is diseased, depraved, or anything but natural and normal. As for the younger partner, the fear, as elsewhere in Greek culture, is that he will be turned into a woman. It is this worry about passivity, rather than any worry about same-sex conduct in particular, that inspires that aspect of Plato's critique.

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n277. See Dover, Greek Homosexuality, supra note 48, at 164.

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(4) Plato's characters suggest that the surrounding society will find regulation of homosexual conduct unacceptable.

(5) The passages contain several peculiarities that must make us cautious in our assertions. These include: (a) the expression of doubt as to whether the proposed regulations are a joke or in earnest, in close connection to an appeal to animal nature, which might arouse some skepticism in a chronic reader of Plato; (b) the idea, made part of the proposal, that it is "noble" to engage in such conduct provided one does not get caught; (c) the fact that the eventual legislation is addressed only to males envisaged as having wives, and thus has no clear implications for premarital behavior or the behavior of women, whose involvement in same-sex activity has been prominently mentioned before.

(6) Plato clearly does not hold Finnis' view either about the high moral worth of marital sex or about openness to procreation. He thinks marital sex necessary, not morally excellent, and elsewhere in the Laws he is an enthusiastic supporter of methods, including contraception and abortion, traditionally used to keep population size down if necessary. The "greatest and most honorable" ministry in the city oversees both fertility treatment and contraception and abortion. n278

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n278. Plato, Laws 740d; see also infra note 317 (discussing abortion in Aristotle).

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For all these reasons, on which I shall elaborate in Appendix 3, it seems wrong to think that there is any basis either for the positive Finnis view of marital sex or for the view that homosexual conduct [*1581] is any morally worse than any other sort of sexual conduct. n279 The most important thing to realize about these passages is how difficult they are to interpret and how mistaken it would be to put forward any simple view without recognizing all the difficulties mentioned, as well as others I have not mentioned.

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n279. Cf. Price, supra note 206, 230-35 (finding such moral condemnation in the Laws). Price has now altered his translation of the relevant passage. See infra Appendix 3.

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In general, Plato is among the philosophers I consider most suspicious about the bodily appetites; he thus diverges the most from ordinary Greek norms. But the divergence is not complete: as I have argued, we may still find ample continuity between his norms and the views of Athenian society, together with a rather extraordinary account of the philosophical dividends of male-male erotic desire.

C. Aristotle n280

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n280. Recommended translations of the Nicomachean Ethics: Aristotle, Nicomachean Ethics (Terence Irwin trans., 1985) [hereinafter Irwin Nicomachean Ethics]; Aristotle, Nicomachean Ethics (W.D. Ross trans., 1925), reprinted in 2 The Complete Works of Aristotle 1729 (Jonathan Barnes ed., 1984). Ross' version is inferior to Irwin's at a number of points. Recommended translations of the Eudemian Ethics: Aristotle, Aristotle's Eudemian Ethics (Michael Woods trans., 1982). For the Politics, the most literal translation is Aristotle, The Politics (Carnes Lord trans., 1984).

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In his surviving works, Aristotle spoke far less about sexual matters than did Plato. Like most Greeks, he did not find the sexual appetite per se problematic. Indeed, he argued that the innate desires of a human being incline toward virtue: "All the virtues of character seem to belong to us from birth in a way. For we are just and moderate and courageous and the rest straight from our birth.... Even children and animals have these natural dispositions, though they evidently prove harmful without rational guidance." n281 The virtue of moderation, Aristotle holds, includes proper balance in choices with respect to sexual conduct. Aristotle believed that we are inclined from birth to balanced and appropriate choice in the sexual realm, though of course it requires much education for those inclinations to mature into this fully virtuous disposition. n282 In general, then, Aristotle lacked Plato's intense [*1582] anxiety about our bodily desires in general, and our sexual desires in particular.

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n281. Aristotle, Nicomachean Ethics 1144b3-b10.

n282. This does not imply a belief in infantile sexuality, which is absent in the works of all ancient thinkers. What Aristotle means is that things are in good order at our birth so that with the proper support and development virtue will in due time be attained.

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For Aristotle, the virtue of moderation "concerns those pleasures that we have in common with the other animals." n283 He explicitly mentions eating, drinking, and sexual intercourse and states that the bodily senses involved are, above all, those of touch and taste. n284 Because we share these pleasures with the other animals, it becomes especially important to characterize, and strive for, a specifically human way of performing them: to manage the use of these appetites by one's own practical reason. Whereas the vicious person Aristotle imagines is totally indiscriminate in his choice of pleasures, n285 the virtuous person, by contrast, integrates bodily expression into the framework of an overall plan of life governed by reason. n286 But this does not mean that he seeks to reduce bodily expression to a minimum, for there is a deficiency of

another sort that a virtuous person must also avoid: having too little pleasure in these forms of bodily expression. n287 Aristotle mentions that this deficiency has no common name in the language because "that does not happen very often." n288 Indeed, he continues,

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n283. Aristotle, Nicomachean Ethics 1118a23-25.

n284. See id. at 1118a25.

n285. See id. at 1119a1-3.

n286. See id. at 1119a16-18.

n287. See id.

n288. Id. at 1119a6, 1119a11.

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such a lack of feeling is not human; in fact, even the other animals make selections of food, and take pleasure in some types and not in others. If there is someone to whom none of these things is pleasant, and one thing does not differ from another, he would be far from being a human being. n289

Although Aristotle's example here is eating, the passage as a whole leaves no doubt that he is making a general claim about all the bodily appetites because he generalizes throughout the passage: the person who strikes the correct balance, he concludes, will "desire as many pleasures as conduce to health or well-beings, in a balanced way and as he should, and other pleasures insofar as they do not impede these or do not contravene the noble or exceed the [*1583] limits of one's material resources." n290 In other words, one's sexual choices, like other choices, should not lead one into excess or ill health or disgrace or extravagance; properly managed, sex can actually be a valuable end worthy of choice for its own sake. Every virtuous action is, by definition, an end in itself, chosen for its own sake apart from any relation it bears to other ends. n291 This is Aristotle's position about reason-governed sexual activity. It need not be justified by any further end it may promote, such as reproduction; properly chosen, it is good in and of itself.

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n289. Id. at 1111a6-10.

n290. Id. at 1119a16-18. The word for which I have, for want of a perfect equivalent, translated "material resources" is ousia, which means one's estate, fortune, property, possessions. In other words, "material" is not meant to refer to one's own body.

n291. See id. at 1153a7-12.

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Aristotle's views are closely related to the popular Greek norms I have previously discussed. n292 As in the popular culture, we find (1) a refusal to treat sex as specially problematic in moral terms - it is just one of the appetites to be managed, like the appetite for food - and (2) the absence of any special connection between the management of sexual appetite and the topic of marriage. In fact, marriage is not mentioned in the entirety of the discussion of appetitive moderation. Aristotle nowhere urges husbands to practice sexual monogamy, though they should not go after the wives of other citizens. n293 Nor is any reservation expressed concerning the gender of one's sexual partner. n294 [*1584]

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n292. See supra text accompanying note 96.

n293. See Aristotle, Nicomachean Ethics 1134a20-21, 1137a7-9.

n294. Marriage is mentioned only twice in the entirety of the Nicomachean Ethics: at 1123a1 as the occasion for an especially big party, and at 1165a18 as an occasion, like a funeral, to which one would want to invite one's relatives. There are, of course, numerous references to the (friendly) relationship between husband and wife, but not in contexts where sexual activity is discussed. In two passages Aristotle cites sleeping with someone else's wife as an instance of unjust or wrongful action. See id. at 1134a20-21, 1137a7-9. This, however, should not be understood as a reference to any intrinsic immorality in nonmarital relations, but rather to a violation of the rights of the woman's husband. Aristotle does hold that moicheia is bad in itself. See, e.g., Aristotle, Eudemian Ethics 1221b; Aristotle, Nicomachean Ethics 1134a19; Aristotle, Rhetoric 1375a. But moicheia includes only sleeping with someone else's wife or concubine and possibly (though this is disputed) sleeping with unmarried women from good families. See Cohen, supra note 120, at 98-109; Dover, Greek Popular Morality, supra note 85, at 209-13. Moicheia was an injury against "the husband's claim to exclusive sexual access to his wife." Cohen, supra note 120, at 109. Thus, it does not bear on the propriety of a married man's visiting a prostitute or hetaira, neither of which would be disapproved at the time. The only passage I know of where Aristotle calls a form of sexual conduct "contrary to piety" is in a reference to incest. See Aristotle, Politics 1262a27 (criticizing Plato's ideal city).

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There is one passage in which Finnis purports to find an Aristotelian condemnation of same-sex activity, n295 and I shall now discuss it. In Book VII of Nicomachean Ethics, Aristotle lists some forms of conduct that are not "pleasant by nature," but result from some "deformities or habits or corrupt natures." n296 First, he discusses a subclass of individuals and conduct that he calls "bestial," providing examples which include cannibalism, slitting open pregnant women and eating their children, selling children for sexual services, and boiling people in cauldrons. n297 Alongside such "bestial" conduct are other related forms of activity that come about through disease - for example, a mad person eating his mother or another mad person feasting on a human liver. n298 Finally, there are some actions that arise from either sickness or habit, "for example pulling out one's hair and biting one's nails, and eating coal or

earth, and, in addition to these, the of [sic] sexual intercourse toward men. For some of these things are by nature, some happen from habit, and some to those who are subjected to abuse from childhood." n299 Aristotle continues: "Concerning all those things for which nature is responsible, nobody would hold that these are akratic [cases where an individual is blameworthy because he knew the better but did the worse], just as one would not hold this about women, on the grounds that they do not mount but are mounted." n300

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n295. Finnis Affidavit, supra note 25, 38; Finnis Rebuttal, supra note 39, 18.

n296. Aristotle, Nicomachean Ethics 1148b15-19.

n297. See id. at 1148b20-24.

n298. See id. at 1148b25-27.

n299. Id. at 1148b28-31.

n300. Id. at 1148b32-33.

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The first thing to notice about this list is the way Aristotle carves it up. In none of the cases does he assign moral blame, because he thinks these people in the grip of a diseased state for which they cannot be held responsible. n301 In addition, the crimes come in various categories; the male-male case, whatever it is, is grouped not with the hideous and gory crimes, but with familiar, if somewhat gross, habits like hair-pulling and fingernail-biting. There is abso [*1585] lutely no evidence that Aristotle wished to regulate such forms of behavior by law or that he thought them a danger to society. n302

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n301. See id. at 1148b33-49a2.

n302. Finnis fails to note these distinctions in his affidavit, simply saying that the male-male case is "the last item on the list of unnatural pleasures." Finnis Rebuttal, supra note 39, 19. Indeed, Finnis draws a contrary conclusion, citing this Nicomachean Ethics passage as evidence that Aristotle "represents such conduct as intrinsically perverse, shameful and harmful both to the individuals involved and society itself." Finnis Affidavit, supra note 25, 38. Will we, then, have a new referendum on the civil rights of nail-biters and hair-pullers?

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Second, the treatment of nature in the passage is in fact complex. It appears to me that Aristotle is shifting from a normative and universal sense of nature - these things are not "pleasant by nature" in the sense of "in accordance with our ethical end as human beings" - to a descriptive and particular sense, in which many of these actions are in fact "according to nature" for particular individuals, in the sense of being in accordance with

the (odd or diseased) constitution that they happen to have. Once again, we must be on our guard when "nature" is mentioned in ancient thought. n303 Aristotle argues that the fact that conduct is in accordance with one's "nature" exempts one from moral blame for it - although that will not stop people from rightly regarding the conduct in question as gross or offensive.

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n303. See supra note 260 and accompanying text.

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What is the conduct in question in the male-male case? The phrase is simply, "the of sexual intercourse toward men." n304 The "the" is a feminine article, which presumably introduces an unstated noun; this noun, to judge from context, would appear to be hexis, "stable state" or "disposition." Kenneth Dover, Anthony Price, and Terence Irwin have all argued independently that what Aristotle refers to is a stable or chronic state of preferring passivity in relations with other men and that what Aristotle is saying about it is that this state can be produced by repeated sexual abuse in childhood. Because this passage was central in the dispute between Professor Finnis and me, let me cite Dover's discussion:

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n304. Aristotle, Nicomachean Ethics 1148b29.

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Perhaps distaste for the subject has prevented translators and commentators from discussing the curious words, "the of sexual intercourse for males" and has induced them to translate it as "pederasty', "faire l'amour avec les males,' etc. If that translation were correct, Aristotle would be saying that subjection to a passive [*1586] role in homosexuality when young disposes one to take an active role when older. This would be a strange thing for a Greek to say; it would also be strange for a Greek to suggest that pleasure in an active homosexual role is "disease-like' or unlikely to be experienced except in consequence of involuntary habituation; the example of the passive sexual role of women as naturally-determined behaviour which cannot be reproached as a lack of control over bodily pleasure indicates that Aristotle's mind is running on the moral evaluation of sexual passivity n305

Dover translates the relevant phrase in the Nicomachean Ethics passage as "those who were first outraged in childhood," n306 making it clear that he believes that child abuse or assault is at issue. As further evidence, Dover goes on to adduce a passage in the Problemata, a work probably produced by Aristotle's pupils, in which the male taste for habitual passivity toward males is explained as resulting either from a defective physiology or from habits of passivity. n307 Dover now comments further on Aristotle's [*1587] cryptic expression of the point at issue. He suggests that the odd dative may mean "the sexual pleasure of males," and that it is dative only because ton aphrodision is already in the genitive. n308 He continues:

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n305. Dover, Greek Homosexuality, supra note 48, at 169.

n306. Id. at 168.

n307. Id. at 169-70 (discussing Aristotelian School, Problemata IV.26). Considering Dover's interpretation, Finnis' summary in his affidavit is very odd:

> Dover's discussion of the views of Aristotle (born 384, died 322 BC) is incomplete and may be judged evasive, discussing only one of several relevant passages in Aristotle's works. But even Dover does not contradict the scholarly consensus that Aristotle rejected homosexual conduct. In fact, Aristotle on a number of occasions (in some cases directly and in other cases by a lecturer's hint) represents such conduct as intrinsically perverse, shameful and harmful both to the individuals involved and to society itself. I refer to his Nicomachean Ethics VII,5: 1148b29, his Politics II,1: 1262a33-39, together with the hints in II,6: 1269b28 and II,7: 1272a25.

Finnis Affidavit, supra note 25, 38. But of course it was precisely Dover's purpose to argue that the Nicomachean Ethics passage does not contain a general condemnation of homosexual conduct, but rather a condemnation of child abuse leading to chronic passivity.

Dover does not mention any of the other three passages cited by Finnis; however, these passages do not change Dover's case. Aristotle, Politics 1262a33-39 is a discussion of the danger of incest in Plato's ideal city. Aristotle notes that, by making all children in the city the children of all the adults, Plato seeks to prevent incest by prohibiting intercourse between the generations, but he does not prohibit "passionate love and the other practices that would be most unfitting between a father and a son, or between a brother and a brother." Id. at 1262a33-37. This hardly amounts to a general condemnation of homosexual conduct. Indeed, in Finnis' narrowly defined sense, the passage does not implicate conduct at all.

The second additional passage, 1269b28, is a discussion of the warlike customs of Sparta and Crete, which Aristotle links with sexual excess; he mentions that most warlike peoples are excessively bossed around by their women at home, "with the exception of the Celts and others who clearly give honor to male-male intercourse." Id. at 1269b24-25. Honoring male intercourse, it would seem, is here seen as a way some warlike nations avoid being excessively female-dominated. Moreover, in the line actually cited by Finnis, Aristotle says that "all [warlike people] are dependent on intercourse with males or with women." Id. at 1269b28. I fail to see what Finnis thinks he finds here to support his claims, as male-male and male-female intercourse are treated exactly alike.

The last passage mentioned by Finnis is 1272a25, at which point Aristotle has been discussing the Cretan custom of public meals. He mentions that the Cretan lawgiver holds oligositia, deliberate undereating, to be healthful and "philosophizes" about it at length. Id. at 1272a25. The Cretan lawgiver also philosophizes about holding down the population size by having men reside separately from their wives, "making them associate with the males" (ten pros

tous arrenas poiesas homilian). Id. Aristotle concludes, "as to whether it is an inferior custom or not inferior, there will be another occasion to conduct a thorough inquiry." Id. Presumably Finnis understands homilia to refer to sexual intercourse with males and takes Aristotle to be hinting that he is going to condemn it somewhere else. The bare statement that one is going to look into whether something is inferior hardly amounts to a conclusion that it is inferior. A more important difficulty is that the passage is plainly discussing the custom of men residing, military fashion, in all-male barracks. This custom is neither necessary nor sufficient for sexual intercourse with males. An army may have single-sex barracks without encouraging same-sex sexual conduct, and, conversely, sexual intercourse between males, at Athens and elsewhere, frequently occurred while the older party was residing with a wife. See Foucault, supra note 96, at 146-47. It is the custom of separate residence, not homosexuality, that Aristotle actually discusses elsewhere, producing arguments that it is good for the upbringing of children for families to dwell together. See Aristotle, Nicomachean Ethics 1180b4-13; Aristotle, Politics 1262a33-b14. Finally, homilia is not, as sunousia is, a standard euphemism for sexual intercourse, and the statement that the legislator "makes" or "causes" this "associating" would surely be odd if it meant sexual intercourse (we know of no laws for mandatory male-male intercourse). In light of that statement, clearly a more likely meaning of the term is requiring men to reside with their fellow males.

n308. See Dover Letter III, supra note 35, at 3.

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It seems to me likely that [Aristotle] expects us to understand ton aphrodision here as referring to sexual enjoyment in the passive role; and it doesn't occur to him that it could be ambiguous, because when he's introduced the subject in the category of things that go wrong he wouldn't expect any reader to regard penetrating as going wrong - it's something that all males must naturally like! n309

In other words, the phrase means a chronic disposition in a male to find sexual enjoyment in the passive role. [*1588]

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n309. Id.

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In a similar manner, Price interprets the passage as referring to a man's "playing the female role" in a way caused by "some pathological state produced by habituation to sexual abuse from boyhood." n310 (By abuse he means not only actual rape but also seduction at an age too young for meaningful consent.) He observes that Dover

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n310. See Price, supra note 206, app. 4 at 248-49.

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rightly stresses that Aristotle is thinking of sexual inversion in particular (which the Greeks disparaged), and not homosexuality in general (which they were far from conceiving as a unitary quasi-medical condition). It is striking that he is not concerned, as we might be, that a sexually abused boy may abuse other boys in his turn; it is habitual passivity, and not imitative activity, that he sees as the danger. n311

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n311. Id. at 249 n.15.

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Note that for neither Dover nor Price does the passage condemn the role that an adolescent male might play toward an older male in approved intercrural intercourse (or even, perhaps, the occasional anal act); the problem is developing a habit of enjoying passivity, something against which cultural conventions dictated.

In his Rebuttal Affidavit, Finnis continued to claim both that the passage condemns homosexual acts generally and that Dover's analysis is consistent with this claim. n312 He argued by appealing to Terence Irwin's recent translation of the passage, n313 asserting that Irwin's way of translating finds that more general condemnation in the sentence. n314 It seems to me that Irwin's translation contains no such condemnation as the one found in it by Finnis. n315 In any case, [*1589] scholars discussing the passage do not rest the case on translation, for here it is context and links to other passages that are decisive. Irwin did not comment on the interpretive issue in the note to his translation, but he has now done so:

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n312. See Finnis Rebuttal, supra note 39, 19 ("As for Aristotle, Dover (though his discussion is unsatisfactory, as I indicated in paragraph 38 of my affidavit) makes no attempt to suggest that Aristotle's rejection of homosexual acts was restricted to the rape of boys. Nor could he have plausibly made such an attempt."). The reader of Dover's discussion might be under a different impression.

n313. See Irwin Nicomachean Ethics, supra note 280, at 1148b15-30.

n314. See Finnis Rebuttal, supra note 39, 19.

n315. The only difference between Irwin's rendering and the one Dover and I present is that he does not choose the awkward "the of sexual intercourse toward males," but simply writes, "sexual intercourse between males." See Irwin Nicomachean Ethics, supra note 280, at 1148b30. Irwin writes that he still considers his to be the best translation: "At any rate, it is better than introducing "pederasty' into the passage (as Ross' translation does) without

any warrant." Letter from Terence Irwin, Professor of Philosophy, Cornell University, to Martha Nussbaum 1 (Dec. 16, 1993) (on file with the Virginia Law Review Association) [hereinafter Irwin Letter]. Irwin agrees with Dover and me, however, that the article he (the "the" in "the of sexual intercourse") stands in for the term hexis, "stable state" or "disposition" (going back, he points out, to 1148b19), and that perhaps this fact should be represented in the translation. See id. Irwin concludes:

Perhaps a reasonable (slightly expanded) translation would be "the state that disposes people to sexual intercourse between males." This expansion would have an advantage in making it clear that the antecedent of "these" in "For in some people these result from [a diseased] nature ..." is "states" (rather than, as Ostwald represents it, "practices"). This expansion, however, wouldn't, as far as I can see, affect the issue of interpretation.

Id.

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The main interpretative issue is this: what is Aristotle referring to when he speaks of "sexual intercourse between males"? We have to choose between (a) homosexual intercourse (between males) in general, and (b) passivity. For reasons given by Dover and Price, it seems to me that (b) is a far more plausible view than (a). The reference to "habit' (ethos) is much easier to understand if Aristotle means that after being repeatedly coerced into passivity people form the habit of being passive. It's far less clear how he could suppose that the repeated experience of the passive role could habituate one to take the active role (he surely wouldn't speak, in that case, of such a reaction as a result of habituation). This argument for (b) is confirmed by the reference in the next sentence to women, where Aristotle is clearly thinking that nature makes them take the passive role; the appropriate parallel with that would be a case of people being habituated to take the passive role. An attempt to interpret Aristotle as expressing a general view on (a) makes it far more difficult to understand the argument of this passage ....

If this is right, then the passage refers to one particular pathological (as Aristotle conceives it) condition, not to homosexuality in general. n316

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n316. Irwin Letter, supra note 315, at 1. Irwin has independently arrived at a solution that appears identical to the one Dover advances in his most recent statement.

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I have dwelt on this passage because so much was made of it in the trial, Aristotle being a philosopher of considerable interest to the witnesses for the State, especially those in the Catholic natural law tradition. I hope that this suffices to show that these witnesses [*1590] cannot claim Aristotle's

support on the topic of homosexual relations any more than on the topic of abortion. n317 They may, however, cite him on the consequences of childhood sexual abuse.

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n317. Aristotle approves of abortions, calling them hosia, "unobjectionable," or perhaps "consistent with religious piety" (the term has a heavier moral weight, on the whole, in philosophical than in nonphilosophical Greek - consider Plato, Euthyphro - and it is hard to place Aristotle's usage here precisely) if performed before the fetus develops the ability to use the senses and therefore feel pleasure and pain. Aristotle, Politics 1335b19-26 (stating that the law should fix the number of children, and that any conceptions beyond that number should be aborted before the time when the fetus begins to move). Aristotle also holds that no "deformed" child should be raised to adulthood, id. at 1335b20, although he does not mention the types of deformities he would include. Thus he appears to permit infanticide as well, because at that time one could not know that the child was deformed before its birth.

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Aristotle, in what little he apparently says about homosexuality, does not differ from the standard beliefs of Greek culture. Anthony Price has now shown, however, that he in fact says much more than previous commentators realized. By supplementing the meager data of the ethical works with scattered remarks on the topic of erotic love in the logical and rhetorical treatises, Price assembles a composite picture that places Aristotle very close to Plato's Pausanias in the Symposium, and close as well (although Price does not say this) to the view of the Greek Stoics who followed Aristotle. n318 All, in turn, do not diverge widely from the Greek popular norms I have discussed. I do not have space here to state and evaluate the details of Price's argument. It has the drawback that it does rely to some extent on examples given in the logical works, where it is not clear that Aristotle is developing a view of his own, but may simply be using hypothetical examples to make a logical point; reliance on the Rhetoric is open to similar criticism. But insofar as Price has been able to link these remarks to passages in Aristotle's ethical writings - and I think that in most respects he has successfully done this - we may cautiously put forward what may have formed the contents of Aristotle's lost writings on erotic love. n319

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n318. See Price, supra note 206, app. 4.

n319. Diogenes Laertius, reproducing a list of Aristotle's writings that probably reflects an early collection in the Peripatetic school, lists an "Eroticus, 1 book," and a "Theses on Love, 4 books." See Diogenes Laertius, Lives of Eminent Philosophers V.22-27.

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The picture that emerges, briefly stated, is as follows: male-male erotic relationships are frequently deficient in mutuality and [*1591] friendliness because of the inherent inequality of the parties. On the other hand, the real aim of (at least some cases of) eros is not intercourse, but friendly love - intercourse is "an end relative to the receiving of affection." n320 Sexual

love, unlike other types of friendly love, must be inspired by a visual response to bodily beauty n321 and the way this beauty awakens imagination. n322 But lovers naturally seek not just the satisfaction of their desire, but also its return; n323 thus, erotic love points toward a certain degree of mutuality in affection and perhaps also in desire. Over time, "Aristotle envisages the emergence of that reciprocal concern and respect which constitute the best kind of friendship, linking individuals not merely as satisfiers of one another's incidental needs, but as partners in a life of personal self-realization. The moral end of love is to transcend itself in friendship." n324 Or, as Price puts it more recently, "Aristotle allows that a homosexual relationship may fuel a mutual familiarity that leads in time to his ideal of friendship - the cultivation of a shared moral character in and through co-operative activities." n325

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n320. Aristotle, Prior Analytics 68b6.

n321. See Aristotle, Nicomachean Ethics 1171b29-32, 1167a3-5.

n322. See Aristotle, Rhetoric 1370b19-25.

n323. See Aristotle, Eudemian Ethics 1238b32-39.

n324. Price, supra note 206, app. 4 at 249.

n325. Price Letter I, supra note 37, at 1.

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Was sexual intercourse to be a part of this picture? Price stresses Aristotle's anxiety (an anxiety present in Greek culture in general) about the development of habits of passivity in the younger partner. n326 Price inclines to the conclusion that Aristotle, not out of moral or metaphysical concerns but for medical reasons, wanted pederasty to focus on " "looking rather than loving,' as Plato had put it." n327 I see no evidence at all in the text for this conclusion, and if Aristotle had intended a conclusion so far from conventional Greek practice one might have expected him to state it. As Price himself states, "Aristotle's moral attitudes, as all agree, were more typical of the Greeks of his time than Plato's." n328 The only evi [*1592] dence for anxiety about the young man's passivity is the passage I have already discussed, in which Price rightly argues that the danger is the production of a certain sort of womanish habit by repeated coercion in childhood. Surely the intercourse envisaged by Pausanias, which begins when the young man has reached the age of judgment and presumably carefully avoids engendering "womanish" habits by focusing on intercrural intercourse, would not court this risk. I see no reason to conclude that Aristotle differed from Pausanias, from the Stoics, and from the prevalent cultural norm regarding the conditions under which sexual intercourse would be appropriate. In a recent letter to me, Price now clarifies his position: by "pederasty" (in the sentence about "looking but not loving") he meant to designate "pederasty towards young boys," those too young for meaningful consent. n329 These are the same boys whose experience he takes to be at issue in 1148b. n330 "I agree," he concludes, "that there is no wider application" and thus no barrier to understanding Aristotle to be in agreement with Plato's Pausanias about the appropriate circumstances for male-male

sexual conduct. n331

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n326. Price, supra note 206, app. 4 at 248-49.

n327. Id. at 249 (quoting Plato, Laws 837c4-5).

n328. Price Letter I, supra note 37, at 2. Price describes those Greek attitudes as follows: "As Nussbaum correctly asserts, what generally troubled the Greeks (like all macho Mediterranean males) was that a man should play the woman's role, especially habitually. It is that, and not the nonprocreativity, which the orator Aeschines, for instance, once calls "unnatural' (i.185)." Id.

n329. Price Letter II, supra note 271, at 2.

n330. Id.

n331. Id.

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To summarize, it is perfectly clear that the active homosexual role is judged by Aristotle (as interpreted by Dover, by Price, and by me) to be morally unproblematic: for an adult man to visit a male prostitute would incur no blame, except in the sense that it would be better to have at least some relationships in which one links desire with friendship and kindly intentions. n332 Nor, as Price and I now agree, would sexual conduct between an older male and an adolescent of the appropriate eromenos age be problematic, provided it observed the cultural protocols discussed above. Finally, I might add that marital fidelity could not supply the Aristotelian husband with a motive for avoiding male-male conduct, because Aristotle never mentions a duty of sexual fidelity in marriage. [*1593]

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n332. And, as Dover points out, except in the sense that men who pay for sex because they are no good at seducing "incur a certain degree of ridicule and contempt in all cultures." See Dover Letter III, supra note 35, at 3.

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D. Epicurus

Epicurus wrote extensively on sex and love, as we know from preserved titles of his works, but little evidence of these writings survived. Epicurus is famous for holding that pleasure is the chief good in human life; however, despite the slanders of his critics, he did not mean by this a life of maximal sensory stimulation. He interpreted pleasure as a healthy state of mind and body, in which both are undisturbed by fear or pain. He held that sexual desire (both homoerotic and heteroerotic, to judge from the examples he gives) is a natural desire, that is to say, a healthy normal part of the living creature's

organization. It is not blameworthy or shameful per se; in and of itself the gratification of this desire is perfectly all right. Indeed, in his work On the Goal, he lists sexual intercourse as among life's most choiceworthy pleasures. Epicurus did, however, hold that the gratification of sexual desire was frequently attended by disadvantages of various kinds: he mentions anxiety, waste of money, quarrels with friends. He believed that these disadvantages were especially likely to be present in relationships accompanied by passionate love. On independent grounds, he discourages marriage and childrearing, holding that these supply life with many sources of disturbance and anxiety. The best sort of sex, then, seemed for Epicurus to be sex free from passion or commitment, but even this should be pursued only if it is accompanied by no other disadvantage. The Epicurean sage would likely live a relatively austere life - not because he believes sex shameful or bad, but because it is all too likely to get mixed up with disturbances such as love, marriage, and childbearing. n333

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n333. The evidence for Epicurus' views on sex is gathered in Martha C. Nussbaum, The Therapy of Desire: Theory and Practice in Hellenistic Ethics 149-54 (1994). I argue there that the Roman Epicurean Lucretius takes a more generous view of marriage and the family, though without any requirement of sexual monogamy for husbands. He, too, recognizes the arousal of a male by a younger male as natural and normal, though it is the anxieties caused to men by women that is his major theme.

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E. Greek Stoicism

The Greek Stoic thinkers of the fourth through second centuries B.C., above all Zeno and Chrysippus, were among the most distinguished philosophers in all antiquity, as we can know even from the summaries and fragments of their work that have been pre [*1594] served. Although the typical "classical education" of today does not focus on Stoicism, this was not always the case. Thinkers of the seventeenth, eighteenth, and nineteenth centuries gave Stoicism a central role in their curricula. Descartes, Spinoza, Kant, Adam Smith, Nietzsche, and many others were deeply indebted to Stoic ideas, and Stoicism had a formative influence on the American founding. n334 We have a distorted picture of our own history if we do not place Stoicism with Plato and Aristotle - indeed, ahead of them in many respects - as sources for modern Western traditions of thought. It is of particular interest, therefore, that Stoicism has a highly developed and generous conception of the role of sexual love in the life of the virtuous person and the virtuous city. n335

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n334. For discussion of these issues as well as references, see id.; see also Martha C. Nussbaum, Pity and Mercy: Nietzsche's Stoicism, in Nietzsche, Genealogy, Morality: Essays on Nietzsche's Genealogy of Morals 139 (Richard Schacht ed., 1994) (discussing the Stoics' influence on Nietzsche).

n335. The best study of this question is Malcolm Schofield, The Stoic Idea of the City 22-56 (1991).

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Sexual conduct, like most of life's activities, is deemed by the Stoics to be an "indifferent." That is to say, it has no moral character in and of itself; everything depends on the state of knowledge and character from which it is done. In this they strongly resemble, and perhaps follow, n336 Plato's Pausanias (and Aristotle, as well). It is a matter of moral indifference whether the sexual act is committed with a woman or a man. n337 In fact, the Stoics typically illustrate their preferred sort of sexual love using male-male examples, though some of the references to "young men" might be translated inclusively as "young people," and though their strong commitment to the equal education and equal citizenship of women makes it likely that they also would have endorsed female-male (and perhaps also female-female) couplings. n338 [*1595]

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n336. This was suggested in Inwood, supra note 184.

n337. See Sextus Empiricus, Outlines of Pyrrhonism I.160, III.200, III.245; Iohannes Stobaeus, Eclogai Phusikai II.9-11.

n338. See Schofield, supra note 335, at 43-46 (arguing that Zeno "was alert to the need to consider relations with young women as well as with young men"). The Cynic philosophers, who were in many respects the Stoics' exemplars offer a famous case of female-male eros: the married philosophers Crates and Hipparchia, who were well known for making love in public in order to challenge the conventional sense of shame. Athenaeus, however, reports that Zeno never slept with a woman, but was always in the company of boyfriends. See Athenaeus, Deipnosophistai XIII.563e.

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What makes sexual love virtuous in the Stoic view? Clearly they thought it could frequently be virtuous. Although the Stoics wished their "wise man" to eliminate most passions from his life, including all anger, fear, and grief, they encouraged him to foster a type of erotic love defined as "an effort to form a friendship due to the perceived beauty of young men in their prime." n339 They held that this love, unlike other passions, was supportive of virtue and philosophical activity. There is no doubt that this love was inspired by a physical response to physical beauty, n340 but, like Pausanias and like Aristotle, the Stoics insisted that virtuous love does not have mere sexual pleasure as its goal. Its goal or raison d'etre was not intercourse, they believed, but philia, mutual friendly love. n341

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n339. For the various different versions of this definition, and their sources, see Schofield, supra note 335, at 29-31.

n340. For conclusive arguments on this point, see id. at 29-34.

n341. This is reported by Diogenes Laertius, who immediately goes on to explicate the point by telling the story of Thrasonides (a character in Menander's Misoumenos, "The Hated One"), who refused to make love to his girlfriend even though she was "in his power," because he saw that she "hated" him. Diogenes Laertius, Lives of Eminent Philosophers VII.129-30. Diogenes seems to interpret the point to be that one should put friendship ahead of one's own sexual gratification, and thus one should abstain from gratification where friendship is not present - not that one must abstain from sexual gratification generally.

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Given the Stoic insistence on the "indifference" of sexual relations, there is no reason to suppose that such erotic couples did not have intercourse. The Stoics stressed the conventional pederastic nature of the relation involved by offering an alternative definition of the art of wise love as "knowledge of the chase [thera] after well-natured young men, a knowledge that is directed at turning them to virtue." n342 Plutarch tells us that Zeno discussed intercrural intercourse in his Republic, one of the major works of Hellenistic political philosophy; the context of the report suggests that Zeno discussed the topic seriously and approvingly. n343 The problem of characterizing the virtuous sex act appears to have been solved in much the way Pausanias solved it: by emphasizing that the high sort of lover really loves the potential for virtue, as revealed in a [*1596] beautiful physical appearance, and that his central motive is to educate. n344 As a proof of their educational commitment, Stoic lovers apparently stayed with their younger partners until the latter were twenty-eight, a fact that causes a speaker in Athenaeus to joke that they will then have to shave both chin and rump. n345

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n342. Iohannes Stobaeus, Eclogai Phusikai II.65.15.

n343. See Plutarch, Quaestiones Convivales III.6, at 653e. The interlocutor, a critic of the Stoics, expresses the wish that Zeno had discussed the matter in an after-dinner speech, rather than in a work of such high moral seriousness. Id. at III.6. He evidently finds the moral emphasis Zeno gave to the topic a bit absurd.

n344. Pausanias, though, was more generous to ugly young men, allowing them to be objects of love if they had beautiful souls. See Plato, Symposium 182c-d. The Stoics seem to have insisted on the beauty of the body.

n345. Athenaeus, Deipnosophistai XIII.564e.

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Zeno held that in the Ideal City eros would be celebrated as a god and as a source of friendship, freedom, and concord. n346 In this again, he follows Pausanias, who connected pairs of male lovers with resistance to tyranny, the suppression of male-male relations with Asian despotism. n347 These partnerships were supposed to give the city rich resources for courage and other virtues, presumably in the way Plato's interlocutors say they do: by producing a keenness of aspiration and emulation inspired by shame of wrongdoing in one's lover's presence. n348

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n346. Id. at XIII.563e.

n347. See Plato, Symposium 182c.

n348. See Athenaeus, Deipnosophistai XIII.561c. The passage mentions, as other sources for Zeno's view, early Spartan views, the tyrannicide of Harmodius and Aristogeiton, the Theban Sacred Band, and a Festival of Freedom in Samia, at which a gymnasium is dedicated to eros. Id.

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As for marriage, the Greek Stoics seem to have followed Plato in viewing it as a potential source of strife and civic disharmony. They therefore not only supported virtuous same-sex relations, but also held that in the city of virtuous people there would be toleration of all consensual sexual relations between men and women, n349 and that when children resulted from these free couplings "we should love all children equally in a parental manner and the jealousies arising from adultery will be removed." n350

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n349. See Diogenes Laertius, Lives of Eminent Philosophers VII.131. Strictly speaking, Diogenes does not mention consent, though he does in his very similar passage about the Cynics. We can supply the requirement of consent from the requirement not to force yourself on someone who doesn't want you, because that is a breach of friendship. Even outside of virtuous eros, the Stoic wise man does not want to sow the seeds of disharmony in the city.

n350. Id.

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It is now possible to summarize: all of the major Greek philosophers, with the possible exception of Epicurus, concur in and develop the Greek popular norm according to which erotic rela [*1597] tionships are better if they focus on the soul rather than simply the body and if they seek stable friendly love rather than unstable and promiscuous passion. And all believe that same-sex sexual desire, including a characteristic orientation of that desire, can be an extremely valuable element in human life, expressive of love and friendship and powerfully linked to other social and intellectual ends. Relationships that involve sexual desire of this kind can be a major vehicle of human aspiration and are generally deemed more valuable as vehicles than are marital relationships, whose ends are generally assumed to be less profound. Aristotle and the Stoics, like Plato's Pausanias and Aristophanes, have no objection to sexual conduct, either homosexual or heterosexual, provided that it is performed with the right motives and ends. Epicurus objects to sexual conduct only when it is connected with marriage, love, and other disturbances. Plato's position on orgasmic gratification is complex and varies during his career. He never holds that same-sex touching and caressing are bad things, so far as I can see; nor does he ever hold that orgasmic gratification is wicked and depraved. He does, in Phaedrus and Laws, hold orgasmic gratification inferior to a nonorgasmic eroticism, in which the appetitive part of the soul offers fewer distractions

to reason, but on grounds of his general suspicion of appetite, not because of any special worries about same-sex acts. Marital acts fare worse than same-sex acts in Symposium and Phaedrus (in the latter, same-sex copulators get rewards from the gods, but child-begetters are simply condemned as animal), whereas the position of the Republic is unclear. Marital acts fare better than same-sex and extramarital acts in Laws - the text of which has many pecularities - not because they are thought to be finer, but because the city has to have them.

VII

I now return to my four claims about the relevance of the ancient philosophical tradition. In the process, I shall answer the moral arguments advanced by Finnis.

First, looking at ancient Greek culture should affect us today as it affected Richard Posner; that is, if we look at the Greeks not as projected images of ourselves, but as they really were, we will be shaken into seeing that many things we think neutral and natural [*1598] are actually parochial. As Michel Foucault wrote in the introduction to his study of Greek sexuality, the Greeks "free [our] thought from what it silently thinks, and so enable it to think differently." n351 We see, in particular, that it was possible not to single out the sexual appetite from the other appetites, as a source of special anxiety and shame; that it was possible not to categorize persons in accordance with a binary division between the homosexual and the heterosexual; that it was possible to regard the gender of one's sexual partner as just one factor in a sexual coupling, and not the most morally relevant at that; that it was possible to hold that same-sex relationships are not only not per se shameful, but potentially of high spiritual and social value. None of these need make the committed Christian change his judgments; they do, however, make the Christian ask on what evidence and argument the judgments are based. This is especially important for the Catholic natural law tradition, which claims to derive its conclusions from reason, not from authority. We need, then, reasoned argument, as we see that our own judgments are not the only ones in the world, and we need to be sure that we have distinguished between reasoned argument and prejudice.

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n351. Foucault, supra note 96, at 9.

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Second, when we look at the Greeks - and in general we admire them as a successful culture and the source of some of our deepest ideas and most cherished cultural artifacts - we notice that the presence of same-sex relationships in both Athens and Sparta did not have the result so frequently mentioned in modern debate: erosion of the social fabric, or, as Professor Harvey Mansfield warned in the Amendment 2 case, the downfall of civilization. n352 In fact, widespread in Athens, as shown in the speeches in Plato's Symposium and Phaedrus, was the view that encouraging such relationships strengthens the social fabric, because pairs of such lovers, through their special devotion to courage and political liberty, contribute more than each would separately. Indeed, Pausanias, in the Symposium, spoke of the resistance

to such relationships in Asia as a strategy adopted by tyrants to discourage "high aspirations in the [*1599] ruled ... [and] strong friendly loves and associations, which ... eros is especially likely to create." n353

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n352. See Deposition of Harvey Mansfield at 94, 117-18.

n353. Plato, Symposium 182c. For similar reasons, they discouraged gymnastics and philosophy! See id.

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Third, when we begin thinking in this way while reading the ancient texts, a striking fact grabs our attention: these same charges of shamefulness, abomination, and destructiveness to the social fabric were known in the Greco-Roman world - not, however, as charges against homosexuals but as popular beliefs about Christians. The historian Tacitus gives us a striking account of the emperor Nero's persecution of Christians in the mid-first century A.D. n354 Christians were beginning to have some social power, and they therefore became handy scapegoats to deflect public anger from the failed policies of the emperor. Charges against them included "nefarious practices" and "hostility to the human species." Thus, says Tacitus, Nero "set up culprits." n355

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n354. See Tacitus, Annales XV.4.

n355. Id.; see also the discussion of this passage in 2 The Annals of Tacitus app. 2 at 416-27 (photo. reprint 1968) (Henry Furneaux trans., 2d ed. 1907).

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A later emperor took a different tack. Trajan, a high-minded Stoic, thought one should not persecute a group without looking into the facts. He charged his minister Pliny to look into the accusations against the Christians. Pliny, the famous letter writer, reported to his emperor that the Christians were not destroying children or doing anything else socially nefarious; they seemed to be ordinary people, who did not deserve to be persecuted. n356 We might reflect on this exchange in relation to a phrase Judge Bayless borrowed from Chief Justice Earl Warren: the trial of Amendment 2, he said, would take place in the light of "evolving standards of decency that mark the progress of a maturing society." n357 [*1600]

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n356. Pliny, Letters to Trajan 96. A good translation is found in the Loeb edition: Pliny the Younger, Letters and Panegyrics X.96 (Betty Radice trans., 1969). The Christians, says Pliny, bind themselves by a solemn oath, "not for any criminal purpose, but in order that they should commit no theft or adultery, or any breach of trust, nor refuse to return a deposit when called upon to do so." Id. Pliny was no hero of tolerance, however; he makes his distaste for the sect very plain, and finds it unproblematic that he has obtained evidence under torture (a standard ancient practice). Id.

n357. Evans v. Romer, 60 Empl. Prac. Dec. (CCH) 41,998, at 73,839 (Colo. Dist. Ct. Jan. 15, 1993) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)), aff'd, 854 P.2d 1270 (Colo.), cert. denied, 114 S. Ct. 419 (1993).

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This interesting parallel, to which we can add the medieval persecution of the Jews mentioned in Posner's book, n358 shows us that so long as a group is invisible, demands nothing, and has no influence, it is unlikely to be the target of attack. It is when a group's presence is beginning to be felt in the culture, but is still lacking societal protection of its rights, that it is most likely to become the target of charges of abomination. Such charges, however, should be confronted by looking into the facts and making good arguments. In the present case, history makes us ask what we are hearing in the charges. It also suggests that there may be profound irony in the positions of John Finnis and Robert George.

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n358. See Posner, supra note 2, at 346.

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Fourth, in addition to the use of history to free thought and to test social hypotheses, this particular part of the history of philosophy is significant because of the intrinsic interest of the moral arguments it develops on this issue of homosexuality. I believe that, although Finnis' moral argument might be criticized independently, a consideration of ancient Greek arguments gives us great help in sharpening that critique. Greek texts show, and show repeatedly, that the passionate love of two people of the same sex may serve many valuable social goals apart from procreation. The couple may communicate love, friendship, and joy; they may advance shared political, intellectual, and artistic ends. Finnis has no argument to rule this out: he has only the bare assertion that such people are in the grip of an illusion, because their reproductive organs are not forming a genuine biological unity. The Greeks show us that this is not the only sort of unity that may promote a human good.

Kenneth Dover, having read Professor Finnis' account of Greek homosexuality, comments upon it in the same vein:

The Greeks were well aware that many homosexual relationships did what the participants hoped and imagined, neither more nor less. If the participants imagined that they were achieving something which for biological reasons they could not achieve, then of course they would have been pursuing an illusion; but why should they have imagined that? n359

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n359. Dover Letter II, supra note 162, at 2.

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As for the secular argument of Roger Scruton, Plato's dialogues cast doubt on this also. Scruton's argument was always a peculiar one: for why should one believe that all individuals of one sex are more like each other in quality than any of them is like any member of the opposite sex? And would Scruton really wish to generalize his argument, as consistency seems to demand, preferring relationships between partners different in age, and race, and nationality, and religion? Even if he were to do so, Plato's dialogues offer good argument against him. Along with Aristotle's ethical thought, they argue that people who are alike in the goals they share and the aspirations they cherish may be more likely to promote genuine social goods than people who are unlike in character and who do not share any aspirations. In addition, the dialogues show that the sort of "otherness" that is valuable in love relationships - that one's partner is another separate and, to some extent, hidden world; that the body shows only traces of the soul within; and that lovers never can be completely welded together into a single person - is quite different from the qualitative "otherness" of physiology and character. Indeed, the "otherness" of mystery and separateness is actually defended in Scruton's argument, as it is in Plato's, as an erotic good.

Finally, reading the Greeks is valuable for the way in which they invite us to share the passionate longing of these same-sex lovers, to be moved by their hopes and anxieties and their eventual joy. The reader of the Symposium and the Phaedrus is not very likely to remain someone who, like the majority opinion and Chief Justice Warren Burger's concurrence in Bowers v. Hardwick, n360 thinks of people who choose same-sex partners as altogether alien and weird. Indeed, reading these moving narratives is itself a form of emotional and imaginative receptivity. To allow these stories and these people inside oneself is not only to gain an education in empathy, but to exemplify some of the very characteristics of receptivity and sympathetic imagination that homophobia seeks to cordon off and to avoid. n361 [*1602]

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n360. 478 U.S. 186 (1986).

n361. I might add that I believe the compassionate imagining of another person's suffering and joy lies at the heart of what is finest in the Christian ethical tradition. In that sense, studying the Greeks accords with Christian virtue.

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VIII

There are several objections one might make to this appeal to history. I cannot deal with every possible objection here, but let me address what seem to me the most prominent.

The first is that the high-minded couplings depicted by Plato have little in common with today's promiscuous gay scene. I do not think it necessary to

spend much time on this objection, because it contains a distorted picture of today's world and the aspirations of men and women within it. Even in Plato's time, promiscuous relations were well known, as deep love and friendship are very well known today. No asymmetry has been demonstrated.

Studying the Greek world may tell us something interesting about this issue of promiscuity: a society that in general tolerated same-sex relationships could be as critical of promiscuity as any n362 and as interested in deeper relationships based on friendly love. The Greeks therefore make us ask skeptical questions about the hasty claim that same-sex relations are inherently linked with promiscuity or superficiality, a claim that was sometimes made in the Amendment 2 debate.

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n362. For a related point see supra note 43 and accompanying text.

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A second objection is far more interesting. It is that the ancient sexual scene is so different in its basic categories from our world that there is no straightforward mapping of today's homosexuals onto ancient Greek actors. What was salient then is different from what is salient now, and to that extent the ancient world lacked the modern conception of "the homosexual," a person with a lifelong disposition toward partners of the same gender. This point, which has been developed by some writers I admire, n363 says important things about the two cultures, many of which I agree with. But three observations must now be made. First, this asymmetry does not help the argument of John Finnis. When he criticizes homosexual conduct in his affidavit, he individuates actions extensionally, not taking into account the thoughts of the parties about the sort of act they are committing. n364 He holds that many, if not most, people [*1603] are in the grip of illusion; what is really morally relevant, then, is the classification by gender and marital relation that can be performed by a neutral observer. And in this sense there is no problem in comparing the two cultures, as Finnis enthusiastically does. Second, this asymmetry between cultures is exactly what reading the Greeks is supposed to reveal to us: the fact that a society may tolerate and even encourage sexual acts between members of the same sex without regarding sex as the most morally salient feature about the act, and without problematizing same-sex desire itself in a special way. The presence of asymmetry does not defeat the comparative project; it makes it interesting. Finally, we should note that any characterization of the Greeks that pushes this discontinuity to the limiting point of total noncomparability, denying that the Greeks had any conception of an erotic preference for members of one's own gender, is clearly refuted by the evidence of Plato. Both Pausanias and Aristophanes know and casually refer to people who have such preferences, indicating as they do so that they are referring to a widely accepted fact about human life. Such people may also marry and have children, the two assert, while continuing to have same-sex relations. n365 To that extent, their form of life is indeed different from that of many modern homosexuals, though certainly not all. Nonetheless, like the preferences of homosexuals today, their preference for same-sex acts is a stable and deep aspect of their personalities.

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n363. See Foucault, supra note 96, at 187-93; Halperin, supra note 107, at 15-40.

n364. I have noted above that he does not individuate actions in this purely extensional way when he is talking of the sterile married couple, whose intentions to maintain a marriage are highly relevant to Finnis' evaluation of their conduct. See supra notes 40-44 and accompanying text.

n365. See Plato, Symposium 181b, 191c-192b.

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The third and most interesting objection to the cross-cultural comparison is the claim that the Greeks' high evaluation of same-sex activity is inseparable from Greek misogyny, particularly the widespread Greek belief that one's deepest loves and aspirations and political goals could not possibly be shared with a mere woman. Should we not, then, rule out using the Greeks as a sign of what we might be, even in the very limited sense suggested by my argument? I see no reason why one should draw this conclusion.

The historical evidence indicates that encouraging same-sex relationships varies to a large extent independently of women's roles. In Sparta, women had far greater freedom and power than in Athens, but Spartan culture gives especially prominent endorsement to same-sex relationships, both female and male. (Recall at this point [*1604] also that the existence of same-sex relations among women complicates the picture.) Moreover, the philosophers give us strong reasons for doubting that an interest in sexual equality need be linked with a tendency to denigrate same-sex relations. Plato probably taught women in his school and certainly argues most seriously for their equal education; n366 he praises relationships that are rich in spiritual and intellectual value, and in his own culture these are most likely to be between males. But there is nothing in his argument itself to prevent an extension of the norm of love in connection with the extension of the educational norm. In Aristotle, too, although the woman remains incompletely equal, there is an ideal of friendly love and reciprocity in both same-sex and opposite-sex relations. As Anthony Price puts it very well in his recent book, in both same-sex and opposite-sex relations, "Aristotle envisages the emergence of that reciprocal concern and respect which constitute the best kind of friendship, linking individuals not merely as satisfiers of one another's incidental needs, but as partners in a life of personal self-realization." n367 These Platonic and Aristotelian norms deeply influenced later Stoic and Epicurean reconceptualizations of marriage as a genuine partnership. The Stoics evidently wished their ideal city to contain not only male-male but also male-female (and possibly also female-female) sexual partnerships, in connection with their norm of gender equality. Indeed, in the view of the Stoics, a just city would minimize gender as a salient feature, adopting, for example, a unisex style of dress. All this suggests a close connection between women's equality and an indifference to the gender of one's sexual partner. n368 Equally importantly, both Platonic and Stoic arguments lead to the conclusion that encouraging same-sex relations of the best sort will promote a general attention to questions of social justice, and that a concerted attention to social justice will lead, down the road, to women's equality. This seems to be a set of connections well worth exploring. Finally, we can all think for ourselves and see that the Greeks' vision of same- [*1605] sex relationships as containing important human goods is in fact completely independent of misogyny, both

logically and empirically. We can see the great support that feminism has received from same-sex relations, both female and male. And we can notice that desire to enforce traditional gender boundaries has been a major source of resistance to the goals of both feminists and lesbian and gay people, in closely connected ways. It seems reasonable, then, to suppose that the historically guided rethinking of the sexual-orientation boundary may also free our minds to think differently and more broadly about gender. n369

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n366. See Halliwell's treatment of this topic in Halliwell Republic V, supra note 214.

n367. Price, supra note 206, app. 4 at 249.

n368. See 1 A.A. Long & D.N. Sedley, The Hellenistic Philosophers 429-37 (1987); Schofield, supra note 335, at 43-46. Schofield argues well for the presence of male-female as well as male-male relations in the ideal city, although he neglects the question of female-female relations. See id.

n369. For an eloquent statement of this position, see Andrew Koppelman, Why Discrimination Against Lesbians and Gays Is Sex Discrimination, 69 N.Y.U. L. Rev. (forthcoming 1994).

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In short, the equation of the ancient with the modern should not be done in a facile and historically naive way. We will not reap the benefits of the comparison if we do not remain vigilant for difference, for it is differences from which we wish to learn. With the proper caution, however, the comparison may be extremely fruitful.

IX

There are many morals that I could draw in concluding. I could talk about the importance of incorporating this sort of study of the history of sexuality into the liberal arts curricula of universities, so that judges will not have to get this material from expert witnesses but will know it already. I could talk, too, about the urgent practical importance of more philological and historical work on these texts and issues, work that would make available to the legal profession and the public at large the full and accurate story about ancient sexual norms. n370

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n370. Dover's wonderful book, Dover, Greek Homosexuality, supra note 48, is indispensable, but it is not sufficient. We need a companion volume on the philosophical tradition.

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But instead of dwelling further on these concerns, I wish to turn, instead, to a different Platonic point: the importance of facing this issue with reason. Plato shows us nothing more clearly, time and time again, than the way in which prejudice can be dispelled by rational argument. His dialogues show us people who intensely disagree, but, so long as they are willing to stay in the argument [*1606] and participate in it sincerely, there is every reason to think that prejudice will eventually fall away and what is of real moral interest will remain. As Plato has Socrates remark in the Republic: things that are strange at first inspire mockery or loathing; over time, this is dispelled by reason's judgment about the best. n371

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n371. Plato, Republic 452d. These reactions are also dispelled by habits of association. See Kenneth Karst, Law's Promise, Law's Expression 105-07 (1993).

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I do not deny that forces impervious to reason can be identified in the present situation. I have seen some of them up close, and it has made me vividly aware of a world that is not the world of scholarship. But I do say this: if the game is simply power, the powerless will always lose. Therefore, to defend the basic civil rights of the powerless we need reason, a force whose dignity is not proportional to its sheer strength. I am convinced that reason supports basic civil rights for homosexuals. If we fight with any other weapon we will have given our adversaries the greatest victory that they could possibly win, that of debasing our humanity. I believe that if we face the issue with good history, precise scholarship, and valid moral argument, we will prevail over prejudice in our judicial system. [*1607]

Appendix 1

The Qualifications of Expert Witnesses in Ancient Greek Thought

If the trial of Amendment 2 marked the first time that testimony about ancient Greek practices and ideas played a prominent role in a gay rights case, it may not be the last. It is proving increasingly difficult for those who oppose antidiscrimination laws for gays and lesbians to establish a rational basis for their position (far less a compelling state interest) by appeal to scientific evidence concerning child molestation. The evidence of the Scandinavian nations, among others, increasingly casts doubt on arguments that invoke the undermining of the social fabric. n372 In this situation, it is possible that the opponents of antidiscrimination laws will increasingly turn to arguments about public morality. They may not buttress these arguments by appeals to explicitly religious positions. As Judge Bayless noted, a specifically religious interest in discouraging homosexuality would properly be addressed by introducing into antidiscrimination statutes exemptions for religious organizations and groups, as had in fact been done in the Denver and Aspen statutes. n373 In this situation, it will not be surprising if many of the same arguments - and even some of the same witnesses - that figured in the Amendment 2 case are heard from again in other states.

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n372. See supra note 26 and accompanying text.

n373. In Evans v. Romer, 63 Empl. Prac. Dec. (CCH) 42,719, at 77,936-937 (Colo. Dist. Ct. Dec. 14, 1993), aff'd, Nos. 94SA48, 94SA128, 1994 WL 554621 (Colo. Oct. 11, 1994), Judge Bayless held that "preserving religious freedom is a compelling state interest," and went on to find that

... in this case is [sic] is obvious that the amendment is not narrowly drawn to protect religious freedom. The narrowly focused way of addressing the Boulder ordinance is to add to it a religious exemption such as is found in the Denver and Aspen ordinances, not to deny gays and bisexuals their fundamental right of participation in the political process. The court specifically finds that Amendment 2 is not narrowly drawn to accomplish the purpose of protecting religious freedom.

Id.

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Whether this is a good idea is debatable. We should be very worried about appeals to philosophical authority that may impede the critical evaluation of arguments. If this line is to be pursued at all, it should be pursued thoroughly, with serious examination and cross-examination of the scholarly credentials of such witnesses. [*1608]

Because classical philology is new to the list of disciplines that supply courts with expert witnesses, there seem to be no shared criteria for determining expertise in this area. Here I wish to propose some. These guidelines are intended to be reasonable, uncontroversial, and minimal. They may serve as guidelines for lawyers in selecting expert witnesses, in reviewing their credentials on direct examination, and in cross-examining opposing experts. They may also assist judges who hear such testimony.

My guiding idea is that at an absolute minimum, an expert who offers testimony on the ancient Greeks should possess the knowledge and skills that a Ph.D. in Classics from a major graduate program at a United States university must possess. (Though British and continental programs have different systems of evaluation, the abilities required of a competent professional are the same.) Having received a Ph.D. in Classics at one time is not sufficient evidence that one presently possesses adequate knowledge or skill. On the other hand, a scholar whose degree is in a different subject, such as philosophy, may prove to have the requisite abilities. What are these abilities, and how might a lawyer test them?

1. Knowledge of Ancient Greek and Classical Latin

Linguistic expertise is one of the most central elements in a classicist's training and the sine qua non of all the others. To receive a Ph.D. in Classics from any major graduate program, one must demonstrate competence at translating, without a lexicon, from ancient Greek, both poetry and prose, ranging typically from the time of the Homeric poems to at least the late fourth or early third

centuries B.C. Aristotle is frequently a terminus in the area of prose, although there is an increasing tendency to extend examination into the Hellenistic period, usually taken to begin just after the death of both Aristotle (322 B.C.) and Alexander the Great (323 B.C.). The Latinist must know how to read material ranging from the early fragments of Latin poetry to at least the first century A.D. and frequently much later.

It is especially important to note that the language of the Greek New Testament is very different in a number of respects from the classical language. Expertise in New Testament Greek is thus not a good test of expertise in Classical Greek. Something similar can be said for Latin. Although some relatively late Christian writers, for [*1609] example Augustine in the fourth century A.D., remain close to classical norms, the language of medieval thinkers such as Aquinas differs markedly from the classical language. A scholar who approaches classical texts from the point of view of a medievalist's training is likely to err in many respects.

Linguistic expertise is routinely tested in two different ways. The Ph.D. candidate is expected to be able to read many authors "at sight," with no previous preparation. In Greek, examples include Homer, Plato, the Greek orators, the historians Herodotus and Thucydides (with the exception of certain especially difficult parts of the latter), the dialogue portions of tragic and comic drama, and Aristotle. In Latin, they would include prose authors such as Caesar, Cicero, Sallust, Livy, much of Tacitus, the prose of Seneca, the poets Virgil and Ovid, and parts of Lucretius, Catullus, Horace, and Propertius. There are other authors and passages that one would not be expected to read fluently having never encountered them before, but the most important of these one must make it one's business to encounter and master. In Greek, these would include the lyric portions of tragic and comic drama, the odes of Pindar, and the famously difficult speeches and digressions in Thucydides; in Latin, the more difficult parts of Lucretius, Tacitus, Horace, and Propertius, and all of the satirists Juvenal and Persius.

An expert in Classics will always know both Greek and Latin. An expert in ancient philosophy ought to know both languages, especially because Epicurean and Stoic thought is preserved in both Greek and Latin sources. But someone who offers testimony only on Plato and Aristotle might grudgingly be allowed to know only Greek, although ignorance of Latin (increasingly and deplorably common in U.S. graduate programs in ancient philosophy) should be clearly elicited on cross-examination, and the incompetence of such a person to offer testimony on Stoic and Epicurean thought should be noted. In no case should someone with knowledge of Latin but an insufficient competence in Greek be qualified as an expert, even were he or she is to be testifying only on Roman philosophy, as Roman philosophy is heavily indebted to Greek philosophy and cannot be effectively assessed without mastery of the Greek traditions.

How should linguistic expertise be tested on the stand? I suggest that the best method is a simple sight translation examination. [*1610] One might select a piece from one of the authors a person should be able to read without preparation - not a particularly difficult passage, but also not one whose contents could be imagined from a general knowledge of the work. A passage from one of the Attic orators, from the narrative portions of Thucydides, from the dialogue portions of Sophocles or Euripides, or from one of the lesser-known parts of Plato and Aristotle might be selected. A similar procedure should be followed for Latin. One might then turn to a more difficult passage, but one

that any expert should have studied closely: one of the difficult speeches in Thucydides, for example, some well-known but difficult tragic chorus, or some difficult sentences in Plato. (I do not propose to name those sentences here, for obvious reasons, but the lawyer can get good guidance from her own experts.) It is important to make the selections fair, but also not to telegraph them beforehand. One aid in the selection of texts would be to get hold of the reading list for doctoral candidates in Classics at the witness' own institution (if it is a good one).

The witness should be shown a good edition of the Greek or Latin text (with, of course, no facing-page translation), and given plenty of time to do the translating. This is important, because good people do take time over these things. One will have to have in hand a literal version prepared by an acknowledged senior expert in the field, preferably someone hors de combat and widely esteemed. Many scholars who do not have the time to serve as expert witnesses themselves might help in this capacity. I suggest, for example, Sir Hugh Lloyd-Jones, Sir Kenneth Dover, Bernard Knox - all people whose expertise and integrity would be above complaint by either side.

It may be claimed that one can offer testimony on Plato and Aristotle without being able to read Aeschylus, Sophocles, Aristophanes, or Thucydides. Lamentably, many U.S. graduate students who study the philosophers do learn one without the others, though most who get doctorates in Classics would not have this limitation. Where we are speaking of ancient sexuality, expertise limited to philosophical texts seems totally inadequate. One cannot possibly assess the views of Plato and Aristotle on this matter without being able to place them in the context of their culture, [*1611] and one cannot do this at all well if one cannot read those authors in the original.

2. Knowledge of Basic Tools of Classical Scholarship

All Ph.D.s in Classics should know how ancient texts are preserved in manuscripts, how modern-day texts are edited, how one assesses the reliability of an edition of a text and proposes to correct it, how one uses lexica and author indices, and how one establishes the meaning of a word or phrase. If the author's work is preserved in fragments cited in other authors, one must know how to assess such sources and how to reconstruct the original from them. One must also know how to be appropriately critical of the ancient biographical tradition regarding the lives of authors. n374 Usually candidates have to learn the details of a few "special authors." For example, in my own graduate education, my special authors were the pre-Socratic Philosophers, Aristotle, and Tacitus, and for these I had to learn about manuscripts and sources in much more detail.

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n374. For good examples of appropriate criticism, see Ingemar During, Aristotle in the Ancient Biographical Tradition (1957); Mary R. Lefkowitz, The Lives of the Greek Poets (1981); Alice Riginos, Platonica: The Anecdotes Concerning the Life and Writings of Plato (1976).

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This sort of expertise will not be tested fairly if one selects authors at random, for an expert on Plato may quite reasonably not know much about the manuscript tradition of Cicero or Aristophanes. A natural strategy will be to focus on those authors on whom the witness has published articles or intends to testify. Again, one needs to have some answers lined up beforehand from an expert in the field. Part of the examination should involve asking the witness which editions of the Greek and Latin texts concerning which the witness intends to testify are best and why they are best. Later editions are not always better.

If the witness proposes to offer testimony on any Epicurean or Stoic thinker, Greek or Roman (including Roman Stoics such as Musonius Rufus and Seneca), the witness must know how to answer questions about the sources of our knowledge of Epicurean and Stoic philosophy, both Greek and Roman. Reconstructing the views of Epicurus and of the Greek Stoics is no easy task, given [*1612] that they survive by and large only in citations and reports in other authors, often of hostile intent or dubious reliability. n375 The Roman Stoics and Epicureans follow their Greek predecessors so closely that one cannot hope to perform a reliable assessment of their thought without as much knowledge as one can have of the Greek sources. n376 The witnesses should have an easy time naming the major sources for the Epicurean or Stoic view on a particular question, and the problems in using those sources. Again, one can back up questions with a statement from an authoritative scholar.

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n375. Both Epicurus and the Greek Stoic Chrysippus were unusually prolific writers, each writing, according to ancient lists, over 100 books of philosophy. But, sadly, we must rely on hostile witnesses such as Plutarch, Galen, and Cicero for much of our information.

n376. For a good account of some of the issues, see 1 Long & Sedley, supra note 368, at 1-9.

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3. General Knowledge of Ancient Greek Literature, History, and Thought

Here one must exercise caution in order to avoid the charge of unfairness, because graduate programs in the United States vary greatly in their requirements, particularly in the areas of history, art history, and archaeology. Harvard's Ph.D. program in my day contained no requirement in any of these disciplines, but did require two courses in Indo-European linguistics, something virtually no other graduate program did. All programs have in common, however, a focus on the major literary authors, the context and history of their works, and the cultural background against which their works ought to be understood. Standard works used in preparing candidates for examinations include Albin Lesky's A History of Greek Literature, n377 which might well be a source for questions. To be fair, one should stay close to the area in which the witness claims expertise. Thus, I would not ask a Plato expert to demonstrate understanding of the latest views on the problem of oral transmission of

poetry, as relevant to Homer. On the other hand, because Plato is constantly locked in combat with the poets of his time, it does seem fair to ask that a Plato expert be able to talk in an informed way about Sophocles, Euripides, and Aristophanes. [*1613]

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n377. Albin Lesky, Geschichte Der Griechische Literatur (2d ed. 1968).

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4. Knowledge of Ancient Sexuality

The witness should have a good general knowledge both of what can be reconstructed about Greek popular thought on morality and of the major works discussing that issue. Where Greek sexuality itself is concerned, a minimum requirement would be a mastery of the evidence and arguments presented in Dover's Greek Homosexuality and his Symposium commentary. Familiarity with the works of David Halperin, John J. Winkler, Michel Foucault, Anthony Price, and Malcolm Schofield, discussed above, would also be important. The witness should be able to evaluate the different source materials we have for the understanding of ancient sexual views and practices, and to describe his or her methodology in putting together information from those sources.

5. General Professional Qualifications

The witness should be examined on his or her publications and on the quality of the journals and/or presses that have accepted them. One may look for evidence relevant to those questions, such as reviews of the witness' work and critical discussions in the articles of others. Additional professional factors that are relevant include: prizes and fellowships won; membership in honorary societies that reward distinguished scholarship; invitations to deliver prestigious lectures or series of lectures; name chairs in universities; and membership and activity in standard professional organizations in either Classics or other related fields, such as History and Philosophy. These aspects of expertise are more obvious than those previously mentioned, and more closely akin to qualifications required of other academic experts.

In addition to the knowledge of Greek and Latin discussed above, a practicing Classicist should have a sound reading (not necessarily speaking) knowledge of French, German, and, preferably, Italian, because major works of modern scholarship are produced in these languages and one cannot claim mastery of one's field without them. Once again, this sort of ability can only be adequately measured by asking the person to translate something - preferably a passage from a mainstream academic article or book in his or her field of expertise. Journalistic French and German are rather different from scholarly French and German, so neither should be used to test reading ability in the other. [*1614]

Appendix 2

Basic Tools of Classical Scholarship - Texts, Translations, Lexica, Commentaries

The affidavits in the Amendment 2 trial raised issues about some of the basic tools of classical scholarship. Because it is easy for the nonexpert to be confused about these issues, I wrote a lengthy surrebuttal affidavit explaining the basic procedures of my trade. n378 This affidavit was never submitted to the court, but the material was to be on file with our lawyers to be submitted should the court express confusion or uncertainty about the conflicting information that had been presented. I now make the essential points available here, as I seek to explain what a classical scholar does and what sorts of evidence she needs to use.

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n378. See, e.g., Arthur W.H. Adkins, Merit and Responsibility: A Study in Greek Values (1960); Dover, Greek Popular Morality, supra note 85; Hugh Lloyd-Jones, The Justice of Zeus (1971); Bernard Williams, Shame and Necessity (1993). These works are in vigorous disagreement with one another at many points, debates with which an expert should be familiar.

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1. Manuscripts and Editions

Here I focus on Plato and Aristotle, but the story for other Greek authors is very similar. Plato died in 347 B.C.; Aristotle, in 322 B.C. Apart from a few bits of papyrus containing only a few sentences and the probably Aristotelian Athenaion Politeia (an extensive papyrus), the first surviving evidence we have of the writings of Plato and Aristotle consists of manuscripts written on animal hide, and, in some later cases, paper, that date from the ninth to the fifteenth centuries A.D., at which point the dissemination of printing caused copying to decline. The reason for the gap of centuries is that during the ninth and tenth centuries A.D. scribes adopted an entirely new style of handwriting, using lower case letters where previously they had used all capital letters. They selected a few of the old manuscripts for copying in the new hand and discarded the rest. This means that all the numerous later manuscripts of both Plato and Aristotle stem from a small number of archetypes, themselves quite far removed from their source. In the case of Aristotle, we have some additional help, as Greek commentators on his work, active between the third and sixth centuries [*1615] A.D., preserved manuscript readings from other, later-discarded manuscripts to which they had access - although, of course, we possess the writings of those commentators only in versions dating from the ninth to tenth centuries and later. It also appears possible that William of Moerbeke, who translated Aristotle literally into Latin for Thomas Aquinas in the thirteenth century, was using a manuscript or manuscripts from a distinct branch of the tradition that has no other surviving exemplars. Thus, William's translation may be used, with caution, as offering independent evidence for the manuscript tradition. There are numerous and important discrepancies among manuscripts,

often affecting the substance of the argument.

A scholar's first task is to look at these ancient manuscripts, to decipher them, to figure out which ones are more trustworthy and how they are related to one another, and to decide what words to print in her printed text of the author. As one might imagine, this is a complicated and technical process requiring a deep knowledge of the ancient language and of one's author. Not every scholar actually looks at the manuscripts, which is all right if one can rely on the "collations" (i.e., recordings of what the manuscript's Greek actually says) produced by others. This is not always possible, however, because collations are frequently inaccurate. n379 In any case, no collation can answer other technical questions about the manuscript, such as the date of its hand, the ink and paper, and so forth. It is always best, then, not to take previous work at face value.

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n379. I discovered, for example, in editing Aristotle's De Motu Animalium, that not only the notoriously unreliable collations by Immanuel Bekker, Aristoteles Graece ex Recognitione (Immanuelis Bekkeri ed., 1931), but also those of the great scholar Werner Jaeger, Aristoteles, Aristotelis De animalium motione et De animalium incessu (Werner W. Jaeger ed., 1913), were seriously inaccurate.

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Let me give an example of how this can work. For Aristotle's De Motu Animalium, n380 we have forty-seven surviving manuscripts, located in various countries. On the basis of microfilm examination, one can eliminate three-fourths of these as derivative from other extant manuscripts and thus of no editorial interest. The remaining quarter one must record carefully, usually first through [*1616] microfilm and then by visiting the libraries in which they are kept. One must do what one can to date them, through handwriting, ink, and so forth. Having noted their discrepancies, one then must figure out what the major branches of the manuscript tradition were, which divergent readings were most likely to be errors, n381 and which might represent a genuine original reading. In some cases none of the preserved variants offers an acceptable sense. In such cases, scholars propose corrections or emendations, guided by the constraints of grammar, the knowledge of the particular author, and humility concerning one's critical role. There are often major disputes about how this should be done, though not so often in the case of Plato and Aristotle. Epicurus' Greek, for example, is harsh and very unlike that of other writers of his time, even in syntax. Scholars argue about whether these differences are signs of corruption in the manuscript transmission or signs that Epicurus wrote a more vernacular, lower-class Greek than that of his surviving contemporaries. Perhaps both are true in some measure. n382

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n380. See Aristotle, Aristotle's De Motu Animalium (Martha C. Nussbaum trans., 1978) [hereinafter Nussbaum De Motu Animalium]. The more technical material is discussed in Martha C. Nussbaum, The Text of Aristotle's De Motu Animalium, 80 Harv. Stud. Classical Philology 111 (1976).

n381. Sometimes this requires thinking about the history of handwriting, as to what copying errors might have been committed in the majuscule or the lower-case hand. Sometimes it involves logical reasoning, such as the principle that a highly difficult, though intelligible, reading is very unlikely to have been introduced by a copyist, and is therefore especially likely to be genuine. (Such a reading is called a lectio difficilior.) A second principle, less reliable, is summarized in the slightly jocular German maxim, "einmal niemals, zweimal immer," or "once never, twice always": if a form or word or usage occurs only once it is probably not genuine at all, whereas if it occurs twice one tends to think of it as the rule.

n382. For an extreme example of the second possibility, see Jean Bollack, Mayotte Bollack & Heinz Wismann, La lettre d'Epicure (1971), which charges previous editors of Epicurus with bourgeois revisionism.

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It cannot be too strongly emphasized that the judgment about what the correct manuscript reading can be is underdetermined, often by purely technical, grammatical, and logical criteria, and requires an exhaustive knowledge of the language and thought of the author. One has to decide what the author could have written and what he could not; this requires knowing the characteristic vocabulary, style, and turn of mind of that author. n383 [*1617]

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n383. A first-class example of distinguished editing in ancient Greek philosophy, both on the technical/logical plane and on the plane of understanding, is Rudolf Kassel's edition of Aristotle's Rhetoric. See Aristotelis Ars Rhetorica (Rudolf Kassel ed., 1976). In the companion volume, Rudolf Kassel, Der Text der aristotelischen Rhetorik (1971), Kassel discusses his procedure. For an English-language discussion of Kassel's achievements, see Martha C. Nussbaum, Book Review, 63 Archiv fur Geschichte der Philosophie 349 (1981) (reviewing the two works). Scholars will continue to dispute, however, the merits of many of Kassel's textual emendations.

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Plato and Aristotle differ in the problems they pose for the editor. Plato's works were regarded with veneration in the master's lifetime and therefore were preserved with unusual care after his death. His works were copied frequently and accurately. The text of the Laws, however, poses notorious difficulties, as Plato's Greek, late in his life, frequently becomes very obscure in construction, and it is difficult to tell whether a given manuscript is a piece of very difficult but genuine Platonic Greek or a piece of impossible garble produced by a bad copyist. It is clear that copyists from the ninth century on were puzzled themselves; hence, the large number of marginalia and glosses, some of which are discussed in Appendix 3. Glosses written between the lines or in the margins sometimes have the status of emendations proposed by the copyist, and sometimes represent genuine readings from other manuscripts he may have consulted.

Aristotle's history is more idiosyncratic. In the Hellenistic period it would appear that his works were available, but it is unclear how widely they were studied. In the late Roman Republic and early Empire, they were both

available and widely studied. After centuries during which Latin and Arabic translations and also Greek commentaries of many sorts were more or less continuously produced, he became enormously popular in the early mediaeval period. This led to a proliferation of manuscripts, but also to some problems. Given that his works were used as school texts, they tend to be filled with marginalia that may or may not represent real manuscript readings, and scribes tend to be all too reflective about what they are copying. (The ideal scribe knows the language well enough to copy it correctly, but has no views about the content that would cause him to editorialize, introducing readings that support interpretations he favors.) The scholar editing the text must be aware of all of these pitfalls. The purely technical demands of reading Greek manuscripts, unlike those of the Latin, where many recondite abbreviations are in use, are not especially formidable; what is central is the full sense of the author and the author's particular tradition. [*1618]

2. Translations

After one has the text, one then has to translate it. But in reality the two tasks are and should be highly interdependent. For any good translator must be in a position to think about how the text was assembled, and what the translation options are. Any good editor must be thinking of the sense of the text.

Translations have many purposes, and there are good translations of several different sorts. A common purpose of translations in previous generations was to put the Greek or Latin of a revered author into elegant English whose style would itself command respect. In such cases, the translator frequently assumed that his or her audience knew the original, and thus felt free to depart from it for the sake of stylistic elegance. This kind of translation is still produced today, especially for poetic works, but its value has been compromised by the almost universal ignorance of Greek and Latin that can be expected in the audience, especially in the United States.

Because translations of the ancient philosophers - including many of those in the Loeb Classical Library - were so often of this sort, a modern goal has been to produce more literal translations that would give the reader as transparent a window as possible onto the Greek or Latin. Thus the Clarendon Aristotle Series, inaugurated by the great British philosopher J.L. Austin, had the explicit aim of making the central texts available in literal translations to philosophers who knew no Greek; this series was supplemented by a Plato series, and more recently a Hellenistic series. Many of the older Loebs are currently being redone, with literalness a central aim. A paradigm of sorts is the set of Aristotle translations produced for Aquinas (who knew no Greek) by William of Moerbeke. These are so careful to achieve consistency in the use of central terms that they can frequently be used to establish the manuscript tradition. n384 William often goes too far in the matter of word-for-word literalness, because he renders syntactic operations, relative pronouns, and other grammatical words into some single word in Latin, even when Latin has no corresponding grammatical form. But I believe that a good practice will be to follow William in choosing a single term to represent each important philosophical [*1619] term of the Greek or Latin, unless there is reason to think that ancient readers themselves noted an ambiguity. n385

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n384. See supra Appendix 1.

n385. This is the principle adopted by Allan Bloom in his translation of Plato's Republic, see Bloom Republic, supra note 214, and by Bloom's student Thomas Pangle in his version of Plato's Laws, see Pangle Laws, supra note 272. I think that Bloom and Pangle sometimes go too far also, producing versions that sound arcane or stilted where the original did not; but it must be said that their versions rarely contain egregious departures from the Greek, as many modern versions do. Most Aristotle translators follow some such principle, because they easily see that literary effect ought to be secondary to philosophical precision in translating that author. Good translators will, in addition, help the reader by providing notes on central terms. Terence Irwin's excellent translation of the Nicomachean Ethics of Aristotle, Irwin Nicomachean Ethics, supra note 280, is a good example, as is his annotated translation of Plato's Gorgias in the Clarendon Plato Series, Plato, Gorgias (Terence Irwin trans., 1979).

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Where there is a history of dispute about the meaning of a word or phrase in a given passage, how does one proceed? One must first of all know one's author as well as one can and be steeped in that author's usage of Greek. There is no substitute for time and immersion, which are the only things that yield anything like a native speaker's sense of the language. One will then proceed in a more narrowly focused way to study all uses of the term and related terms in that author, using either the valuable author concordances that exist - such as Brandwood's A Word Index to Plato n386 - and look at all the passages, to see what English term will fit them. The way of deciding whether a given English word will do in a given passage must involve trying it out in the other passages where it, or its relatives, occurs. One should prefer a choice that passes this test of consistency, unless there is reason to suppose the word ambiguous or to suppose that the author's usage of the term shifts over time.

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n386. Leonard Brandwood, A Word Index to Plato (1976).

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In this way one frequently notices errors and anachronisms committed by scholars who have not worried about consistency. To give one example to which I devoted some labor, n387 the terms phantasma and phantasia, in Aristotle and his Hellenistic successors, are frequently rendered "mental image" and "mental imaging." This already arouses suspicion, because those concepts are firmly associated with the philosophical views of Hume and other [*1620] empiricist thinkers of recent date. An argument is required to show that the ancient thinkers had this concept. As it happens, however, an investigation of the contexts reveals that there are many uses of the terms that cannot be rendered this way; these uses must be rendered as "appearing," "appearance," and so on, keeping the nouns close to the verb (which clearly means "appear") from which they derive. I and others have argued that it is preferable to retain that sense in translating, where possible - and that it is certainly wrong to import the

modern empiricist notion of images. There are many many cases of this kind. n388

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n387. See Nussbaum De Motu Animalium, supra note 380, at 221-69. On the Hellenistic notions, see Gisela Striker, Skeptical Strategies, in Doubt and Dogmatism: Studies in Hellenistic Epistemology 54 (Malcolm Schofield, Myles Burnyeat & Jonathan Barnes eds., 1980).

n388. For my related argument concerning the verb tolmao and the noun tolmema, see infra Appendix 3.

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Because John Finnis has repeatedly spoken of the lexicon, we must now ask, where in all this do lexica enter in? Lexica are not dictionaries. Because there is no extant native-speaker tradition, lexica are simply compilations of texts, together with meanings that the scholar or scholars writing them have seen fit to give to these texts. This means that they are very helpful, and, if well done, authoritative, in bringing the evidence together. A well-done lexicon will give reliable information about the range of authors and periods in which a given term is used, and will offer a sprinkling of representative passages; a good lexicon should contain all words that are attested in the period it covers. Lexica also provide sample translations of terms. But when they take on that function, they are no more authoritative than the judgment of any other competent scholar. Lexicographers are not always the best scholars, and what they gain in breadth of experience they frequently lack in depth with a particular author. Henry Liddell, in the last century, was a distinguished scholar; his modern successors are not always so. This means that no competent scholar takes the lexicon as the last word on meaning. Its status is exactly that of a scholarly translation or article. The lexicon may be cited as corroborative evidence, but this should be done only after a scholar has produced her own independent linguistic argument based on her own sifting of the evidence. n389 (In the case of phantasia, the lexicon was wrong like everyone else - British intellectuals of that period simply [*1621] assumed that mental images were a ubiquitous and universal language of the mind.)

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n389. This is obvious to expert scholars, but nonetheless I cite two corroborating statements. From Richard Sorabji, director of the Institute for Classical Studies at the University of London:

It would ... be useless to rest content with entries in the standard Ancient Greek Dictionary, Liddell and Scott's Lexicon. Although that is the best of the available dictionaries for the purposes of learning Ancient Greek, it has to be used with caution in matters of scholarship, and can serve at best as an initial source of opinions.

Sorabji Letter, supra note 64. From Anthony Price:

It would be ... erroneous to cite some particular edition of a Greek lexicon as if that was gospel: lexicographers of a dead language have nothing to go on but the same evidence that is available to the rest of us; they have too much material to digest, and they make mistakes.

Price Letter I, supra note 37, at 1.

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Where different editions of the lexicon are at issue, a point again stressed by Finnis, the superiority of one version to another very much depends on the purpose for which it is being used. Later editions of the Liddell-Scott lexicon n390 incorporate much more data, in particular data from technical and scientific authors of the classical period that were ignored by Liddell and Scott, and data from many later authors, because those two did not venture much beyond Plato. These later editions also incorporate findings produced by archaeological discoveries that postdate the work of Liddell and Scott. So, of course, if one wants to know who uses a term in a variety of centuries and to study its whole history, the later editions are superior but not impeccable.

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n390. See supra note 53.

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If, however, one wants initial guidance or corroboration regarding an author common to both editions, then it is not at all clear that the later editions are superior. As frequently happens in scholarship, later does not always mean better. The text of Plato has been around in its present form for a long time. A lexicographer, like any other translator or scholar, is only as good as his or her knowledge of the author. A nineteenth-century scholar such as Liddell could perfectly well be a better Platonist than a lexicographer of recent date. In a similar way, certain errors in the translation of Aristotle's Nicomachean Ethics that were produced by the overwhelming influence of Utilitarian thinking in the nineteenth and twentieth centuries were actually not present in eighteenth-century translations, and have only just now been corrected again [*1622] in Irwin's version. n391 There is not linear progress in scholarship in this field. In fact, one of the greatest interpreters of Aristotle's thought and language was Alexander of Aphrodisias, a Greek of the second and third centuries A.D.

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n391. I refer to the well-known question of how one ought to translate ta pros to telos - as "means to ends," or as "that which pertains to the end." The latter is clearly correct, as was seen by Thomas Taylor in the eighteenth century, and Irwin in the late twentieth. See Nussbaum, supra note 8, at 296-97 (with reference to the work of David Wiggins and John Cooper on the question).

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In short, if a lexicon is cited, it has no weight without an independent linguistic argument, though in connection with such an argument it may have some corroborative value. [*1623]

Appendix 3

Homosexuality in Plato's Laws

Plato's Laws, left without final revision at the time of his death in 347 B.C., poses unusual problems for the interpreter. Plato's late style contains peculiarities that frequently make it difficult to establish the Greek text with certainty, because one can remain unsure whether what one is reading is a genuine, though gnarled and difficult, piece of Platonic Greek or a piece of garbled transmission. n392 Homosexual conduct is discussed in two different parts of Plato's work. In Book I, it is discussed in connection with the virtue of sophrosune or self-control, and in close proximity to a far lengthier and more emphatic treatment of drinking and drunkenness. In Book VIII it is discussed at far greater length in connection with the making of laws regulating sexual conduct.

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n392. The Oxford Classical Text (J. Burnet ed., 1907) [hereinafter OCT] is deficient both in its editorial judgments and in its very reporting of what the ancient manuscripts say. There is no doubt that the best existing edition of the Greek text is that of Auguste Dies and Edouard Des Places made for the French Bude Series. See supra note 80. I shall not go fully into the paleographical and text-critical problems faced by Dies and Des Places, but shall simply begin from their text - noting, on occasion, its divergences from other editions. I note that Pangle, although he correctly notes the vast superiority of the Dies text to the OCT, and generally follows Dies, reverts to the OCT to pick up the reference to an "ancient law" that is present in the OCT but not in Dies. See Pangle Laws, supra note 272. No explanation for this choice is proferred.

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The Book I passage occasioned considerable discussion in the trial documents. In my testimony and affidavit, I offered no account of the passage as a whole. Instead, I confined myself to the discussion of a single sentence, which, in order to demonstrate the scholarly inadequacy of Finnis' methods, I discussed as one of a series of examples of mistranslations, rather than as part of my description of Plato's views. Now, however, it is time to discuss the passage as a whole, asking what sort of criticism of homosexual conduct is made in it and whether it reveals an attitude that treats this conduct as wicked and depraved.

The Athenian Stranger (the leading character in this work, replacing Socrates), has been asking his Spartan and Cretan interlocutors about their customs of public gymnasia and common meals. He expresses an opinion: [*1624]

For instance, although these gymnasia and common meals now benefit cities in many other ways, they are dangerous with regard to faction - as the youth of Miletus, Boeotia and Thurii show - and in particular, it seems that this practice when a custom of longstanding has even corrupted the pleasures of sex which are natural not only to men but also to beasts. For this, someone might hold your cities primarily responsible and as many other cities as make particular use of gymnasia. And whether one is jesting or being serious, one must think the following thought; that is, one must think that the pleasure

concerning these things seems to have been granted in accordance with nature to the female nature and to the nature of men when they have intercourse for procreation; but that pleasure seems to have been granted contrary to nature to (the nature of) men when they have intercourse with men or to (the nature of) women when they have intercourse with women and that the daring of those who first did this was due to their lack of self-control in the face of pleasure. We all charge the Cretans with themselves fabricating the story about Ganymede; because they were convinced that the laws came from Zeus, they told this story about ... Zeus so that they might be following the god's example when they also enjoyed this pleasure. n393

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n393. Plato, Laws 636b1-d4 (Christopher Bobonich trans., Nov. 1, 1993) (unpublished manuscript, on file with the Virginia Law Review Association) [hereinafter Bobonich Laws]. Bobonich, who at this point is probably the English-speaking world's leading authority on the Laws, has a refined familiarity not only with Plato's Greek in general, but with the strange Greek of this work, as well as with the entirety of its thought and argument. With regard to this passage, I differ from him only in two respects. First, I translate diephtharkenai as "ruined" rather than "corrupted," because I think the sense of the passage is that people do not take (as much) pleasure in opposite-sex relations any more, not that they do, but in a corrupt way. (For a related use of diaphtheirein, see Plato, Symposium 174b3-6.) Further, what I render as "added" in the penultimate line (following the suggestion of Kenneth Dover, see Dover Letter III, supra note 35, at 3) is rendered by Bobonich as "told."

Pangle's published version is rather close to Bobonich's, see Pangle Laws, supra note 272, except where Pangle diverges from his usual wise use of the Dies text. Dover diverges from Dies at this point as well, without any discussion of the textual issues. He does not cite the whole of the passage, omitting the remark about joking, and he translates a later sentence differently as well, as we shall see.

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Notes on the translation are difficult to construct for a nonspecialist audience, but the following points should be made. I move from the easier to the more difficult. [*1625]

1. "For this" (literally, "for these things") is all that is in the Greek. Pangle's "these offenses" n394 supplies a noun of his own devising.

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n394. See Pangle Laws, supra note 272, at 636b.

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2. "One might hold responsible" is a translation of the verb aitioo, which connotes a general idea of holding-responsible, ascribing causal origin to. n395 Thus "blame" would be a bit overinterpretive, although not really bad here,

because it is evident that the Athenian Stranger does mean to criticize the conduct in question in some manner.

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n395. See Michael Frede, The Original Notion of Cause, in Essays in Ancient Philosophy 125, 128-50 (1987).

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3. "Lack of self-control" translates akrateia, which I have discussed above. n396 Here Dover's "inability to control the desire for pleasure" n397 is good; Bury's "slavery to pleasure," n398 a melodramatic overtranslation that obscures the crucial difference between akrasia and compulsion.

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n396. See supra text accompanying notes 76-78.

n397. Dover, Greek Homosexuality, supra note 48, at 186.

n398. Plato, Laws 636c.

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4. "Has been granted": in the Greek it is clear that this verb governs both the same-sex and the opposite-sex pleasures, so that if one were tempted to see an implication of natural order or divine command, one would have to see it in both places. Bobonich sees no such implication and takes the word, as I do, to mean simply "is given in experience."

5. "When a custom of longstanding": reading, with the Dies text, palai on nomimon, rather than palaion nomon. This reading, which has manuscript authority, makes the construal of the entire sentence much more straightforward. The references to "ancient law" in Pangle and Dover result from their adoption of the other reading, which I (with Bobonich, England, n399 and the Bude editors) would argue to be inferior. Construing the text as these critics do, we find that the object of the verb "ruined" must be "pleasures," whereas in the other case things get very messy because there are in effect two objects. Dover's "seems also to have undermined a law which is old and in accordance with nature: I mean the plea [*1626] sure which" shows the difficulty, for how a pleasure can be a law is most unclear.

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n399. E.B. England is the author of the major philological commentary on the Laws. See Plato, The Laws of Plato (E.B. England ed., 1921).

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6. "And that the daring of those who first did this": here we get to the sentence that was especially controversial between Finnis and me. This version is agreed to by Bobonich, n400 by me, by Anthony Price, n401 and by Pangle. n402 In his oral testimony and in his Rebuttal Affidavit, Robert George claimed that Pangle used the word "offenses" here, rather than "daring." Presumably George,